Ontario

Workplace Safety and Insurance
Appeals Tribunal

Tribunal d'appel de la sécurité professionnelle et
de l'assurance contre les accidents du travail

WSIAT Annual Report

2012

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Workplace Safety and Insurance Appeals Tribunal
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Introduction

The Workplace Safety and Insurance Appeals Tribunal (WSIAT or Tribunal) considers appeals from final decisions of the Workplace Safety and Insurance Board (WSIB or the Board) under the *Workplace Safety and Insurance Act, 1997* (WSIA).

The WSIA, replacing the *Workers' Compensation Act*, came into force January 1, 1998. The Tribunal is a separate and independent adjudicative institution. It was formerly known as the Workers' Compensation Appeals Tribunal, until the name was changed pursuant to section 173 of the WSIA.

This volume contains the Tribunal's Annual Report to the Minister of Labour and to the Tribunal's various constituencies, together with a Report of the Tribunal Chair. It is primarily a report on the Tribunal's operations for fiscal year 2012 and comments on some matters which may be of special interest or concern to the Minister or the Tribunal's constituencies.

The Tribunal Report focuses on Tribunal activities, financial affairs and the evolving administrative policies and practices.

Chair's Report

2012: Year of the Appeals Tsunami

"Rule, Britannia!" contains a line "Britannia, rule the waves." In 2013, the Appeals Tribunal must follow in Britannia's wake and attempt to deal with one giant wave from 2012 which swamped the Tribunal with appeals. Although the Tribunal adjudicator roster shrank in 2012, the appeals caseload increased by over 40%. The message from the Tribunal's 2011 Annual Report was obviously correct when it concluded "...the Appeals Tribunal faces a year of significant challenges. Hopefully, it will also be a year in which all interested parties recognize the quality of the adjudication process and decisions and strive to ensure that Ontario has a quality administrative justice system in spite of financial pressures."

The 2012 financial pressures, combined with the large increase in appeals, as well as staff and Vice-Chair shortages, resulted in longer timelines for processing appeals and scheduling hearings. While the financial pressures generated frustration both inside and outside the Appeals Tribunal, the remaining staff and adjudicators continued their attempts to provide quality service and quality decisions. Those efforts resulted in a successful year for the Tribunal on the judicial review front, despite pressures generated by the tsunami wave of appeals and increased workload.

In an effort to rule the wave of appeals, the Tribunal continued to test and interview prospective adjudicators in an attempt to rebuild the adjudicator roster with competent Vice-Chairs and Members. Applicants must possess a high degree of knowledge of compensation and administrative law, competence in the evaluation of medical evidence and testimony, as well as the application of legal principles, Board policies and Tribunal case law. They must also be able to manage fair hearings and produce well-reasoned decisions which fairly resolve factual, medical and legal issues in a manner that is consistent with Tribunal case law and conforms to the principles of administrative law. Undoubtedly, these efforts will continue throughout 2013, provided the Appeals Tribunal receives the necessary budget resources to rebuild its adjudicator roster to deal with the huge appeal caseload.

It is unusual in any appeals system, whether within the judiciary or administrative justice system, for parties to have the option of an oral hearing at the final level of appeal. The Tribunal has taken the position that parties should have an opportunity to tell their stories and, for that reason, the Appeals Tribunal process allows the introduction of new evidence, testimony and new submissions at the Tribunal appeals level. While the Appeals Tribunal would be reluctant to eliminate this oral hearing option, any ongoing budget/financial pressures may result in elimination of oral hearings and a significant reduction in full panel hearings. Although those changes would reduce the quality of the adjudicative process, limited operating resources may leave the Appeals Tribunal with no other option.

Input from the injured worker and employer communities, the legal community and interested observers may increase appreciation of the reasonable costs associated with the Appeals Tribunal process, particularly when compared to court-based litigious workers' compensation systems in jurisdictions like California. Unfortunately, elimination of oral hearings and reduced full panel hearings may also generate an increase in judicial review applications, which would obviously add to the legal costs of our operation. While the Tribunal's small business approach to controlling costs through the use of new tools such as electronic filings, online transfer of appeal records and submissions, as well as a mediation process, may help to reduce some costs, these small additional tools will not eliminate a 40% increase in the appeals caseload.

Hopefully, the Appeals Tribunal's 2013 Annual Report will describe the year of a safe voyage through the appeal waves. Realistically, to achieve that objective, the Tribunal will require increased financial, technological

and personnel tools. The solution is available; however, to secure sufficient resources to implement it, the Tribunal must deliver its message to interested members of the administrative justice community: the basic message, as written by Sir Winston Churchill, is "Put your confidence in us … Give us the tools, and we will finish the job."

Highlights of the 2012 Cases

This section reviews some of the many legal, factual and medical issues which the Tribunal considered in 2012.

The Tribunal decides cases under four Acts. The *Workplace Safety and Insurance Act, 1997* (WSIA) came into force on January 1, 1998. It establishes a system of workplace insurance for accidents occurring after 1997, and continues the pre-1985, pre-1989 and pre-1997 *Workers' Compensation Acts* for prior injuries. The WSIA and the pre-1997 Act have been amended several times, including amendments contained in the *Government Efficiency Act, 2002* (GEA), effective November 26, 2002, and Schedule 41 of the *Budget Measures and Interim Appropriation Act, 2007*, effective July 1, 2007. In addition, the Tribunal considers and applies policy adopted by the Workplace Safety and Insurance Board. The substantive provisions and terminology contained in Board policy vary over time. This review uses the policy terms and concepts considered in the Tribunal cases discussed in the review.

Appeals Under the WSIA

The WSIA provides for loss of earnings (LOE) benefits for workplace injuries, as well as non-economic loss (NEL) benefits for permanent impairment. The amount of LOE benefits depends on the extent to which the worker can return to the workplace and replace pre-injury earnings. There are statutory provisions setting out a worker's and employer's obligations to co-operate in early and safe return to work (ESRTW). The WSIA also creates a re-employment obligation where a worker has been continuously employed for at least a year. Labour market re-entry (LMR) services and LOE benefits may be available where a worker is unable to return to work with his employer.

LOE benefits are reviewable on "material change in circumstances," or annually at the Board's discretion, for a period of 72 months from the accident date. When the WSIA was initially enacted, LOE benefits could not generally be reviewed after 72 months; however, subsequent amendments in 2002 and 2007 allow for review in a number of circumstances, including when a worker suffers a significant deterioration which results in a redetermination of a NEL award. LOE and NEL appeals represent a large portion of the Tribunal's caseload.

1294/12

Decision No. 1294/12, 2012 ONWSIAT 1786, is of interest for its discussion of the differences between a failure to co-operate in LMR activity and failure to co-operate in health care measures on entitlement to LOE benefits. Failure to co-operate with LMR may result in a worker being determined to be capable of earning wages under section 43(2) of the WSIA. Failure to co-operate in health care measures, on the other hand, allows the Board to reduce or suspend payments under section 34(2) while the non-co-operation continues. Failure to co-operate in health care measures under section 43(7)(a) also authorizes the Board to reduce or suspend benefits during any period of non-co-operation. These sections indicate that the reduction or suspension for non-co-operation in health care measures is intended to motivate compliance and is not meant to be a permanent reduction.

1795/11

Decision No. 1795/11, 2012 ONWSIAT 542, is one of the first cases to consider re-employment obligations contained in Ontario Regulation 35/08 for employers engaged primarily in construction. A construction employer is obliged to offer to re-employ a worker until the earliest of: the second anniversary of the injury; one year after the worker is medically able to perform the essential duties of pre-injury employment; the date the worker declines a re-employment offer; or the worker reaches 65 years of age. Section 8 creates a presumption that the re-employment obligation is breached if a worker is re-employed and then terminated within six months of the date of re-employment and not re-employed at a similar construction project. In *Decision No. 1795/11*, the worker returned to modified work but was subsequently terminated as part of a broader lay-off due to lack of work.

The termination of employment and failure to re-employ the worker within six months at comparable work triggered the presumption. During the six-month presumption period, the employer hired at least one worker without contacting the worker to offer him the job. The Vice-Chair found that the employer breached its re-employment obligation when it hired the other worker. The Regulation places the onus on the employer to manage the re-employment process by contacting the worker. Further, the re-employment obligation did not end when the worker obtained comparable work with another employer. The worker continued to be entitled to re-employment benefits, although the quantum of benefits might be affected. The Vice-Chair waived any re-employment penalty against the employer, however, since the re-employment provisions for the construction industry were relatively new at the time.

960/11

Difficult adjudicative issues may arise where an injured worker has returned to work or modified work and the employer's plant subsequently closes. The Tribunal must determine whether the resulting loss of earnings flows from the compensable injury or the employer's closure. Further complications may arise in the case of an older worker. The WSIA, section 43(1)(c), provides that a worker who is 63 years or older on the date of injury is entitled to LOE payments for two years after the date of injury. *Decision No. 960/11*, 2012 ONWSIAT 212, considered section 43(1)(c) where an older worker had returned to pre-accident duties with very minimal accommodation before the plant closed. Considering the negligible accommodation, the Vice-Chair was satisfied that the worker was able to do the essential duties of her pre-accident job and the compensable condition was not a barrier to finding similar work. The worker was not entitled to LOE benefits as the loss of earnings was related to the economic situation, not the compensable injury.

1499/12

Section 43(1)(c) was also considered in *Decision No. 1499/12*, 2012 ONWSIAT 1788, which recognized that entitlement for the full two years is not automatic. It must be established that the older worker's loss of earnings is due to the compensable injury. While an older retired worker would not ordinarily have earnings, the retired worker in *Decision No. 1499/12* had been asked to return to work by his employer and was injured in the post-retirement job. The Vice-Chair was satisfied that the employer would have provided him with further employment opportunities and awarded LOE benefits under section 43(1)(c) for two years.

2770/01

An issue that has arisen previously is whether an employer's contributions to a multi-employer benefit plan should be included in a worker's earnings basis for the purposes of calculating an LOE award (or a future economic loss (FEL award) under the pre-1997 Act). The definition of "earnings" in the pre-1997 Act and the WSIA excludes contributions for employment benefits. *Decision No. 2770/01*, 2012 ONWSIAT 1156, noted that there is now an unbroken line of Tribunal decisions, supported by the Court of Appeal decision in 2008 ONCA 719 (leave to appeal refused in [2008] S.C.C.A. No. 541), that employer contributions to benefit plans are not earnings for the purposes of benefit determination since they are excluded by the statutory definition of "earnings." While the worker raised a new argument that the reference to contributions in section 7 should be narrowly interpreted to refer to only the first year after the injury, "earnings" is never used in the legislation to refer to post-injury earnings from the accident employer while absent from work. Legislative amendment to the provisions governing the calculation of average earnings and/or wage loss benefits would be required for this interpretation.

883/12

TTurning to NEL awards, the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3rd edition revised) (AMA Guides) is the prescribed rating schedule under Ontario Regulation 175/98, section 18. Situations may arise, however, where the AMA Guides do not appear to fully address the permanent impairment arising from a compensable

injury. An example of this occurred in *Decision No. 883/12*, 2012 ONWSIAT 1232, which involved a NEL award for pleural plaques. Table 8 of the AMA Guides for respiratory impairment refers to pulmonary function tests; however, Table 9 also includes a list of conditions that may cause impairment that is not readily quantifiable by spirometry, diffusing capacity or measured exercise testing. *Decision No. 883/12* reasoned that Table 9 suggests that the AMA Guides recognize that not all respiratory conditions will cause an impairment that is readily quantifiable but that such impairments may exist and should be rated. Based solely on pulmonary functions tests, the worker's condition had not changed but, given his other symptoms, the NEL award was increased to recognize a moderate impairment in the mid to high range.

1357/07I2

Decision No. 1357/07I2, 2012 ONWSIAT 956, contains an interesting analysis of the Tribunal's jurisdiction in light of the WSIA provision limiting the Tribunal's jurisdiction to "final decisions" of the Board. While the Board is in the best position to inform the Tribunal whether it considers its processes to be complete in a particular case, the Tribunal must determine its jurisdiction. For the Tribunal to have jurisdiction, it is not necessary for the Board to have addressed all the legal arguments that could have been raised or for it to have complied with its usual internal procedures.

Board Policy Under the WSIA

While the Tribunal has always considered Board policy, the WSIA, section 126(1), expressly states that, if there is an applicable Board policy, the Tribunal shall apply it when making a decision. Section 126 provides that the Board is to provide applicable policy to the Tribunal and section 126(4) sets out a process for the Tribunal to refer a policy back to the Board if the Tribunal concludes that the policy is inapplicable, unauthorized or inconsistent with the Act. Policy issues may also arise in other circumstances; for example, the Board may ask the Tribunal to reconsider a decision in light of Board policy or it may be necessary for the Tribunal to interpret Board policy or to decide which version of a policy applies.

1057/09I2

In 2012, there was one section 126(4) referral involving the Board's clothing allowance policy. Prior to 1996, Board policy provided for the same maximum clothing allowance for clothing damaged by Harris back braces and soft back braces. Under the 1996 policy, the Board reduced the clothing allowance for soft braces to 50%. As of 2006, the policy was changed to reinstate the full allowance for both types of braces. *Decision No. 1057/09I2*, 2012 ONWSIAT 1547, referred the 1996 clothing allowance policy to the Board under section 126(4) of the WSIA. Post-hearing activity in this matter was ongoing at the close of 2012.

1096/11I2
1717/11

Previous Annual Reports have noted that Board policy often changes over time. The rights and obligations of parties may vary significantly depending on which version of a policy applies. Tribunal cases have previously found that section 126 policy is similar to legislation since the Tribunal must apply it and the presumption against retroactivity applies. In 2010, the Board adopted Interim Work Reintegration policies, which are stated to apply to decisions made on or after December 1, 2010, and which introduced the concepts of "work reintegration" and "suitable occupation" (SO). These interim policies were replaced by the 2011 Work Reintegration policies, which state that they apply to all decisions made on or after July 15, 2011. *Decisions No. 1096/11I2*, 2012 ONWSIAT 1000, and *1717/11*, 2012 ONWSIAT 1071, considered arguments that the Work Reintegration policies should apply retroactively. Both cases applied Tribunal case law that the relevant "decision" for determining applicability of a Board policy is the initial operating level decision, not the ARO decision. This interpretation is consistent with the legal principles governing retroactivity and with the Board's approach in these cases. *Decision No. 1717/11* also noted that the new Work Reintegration policies introduce penalties

for employers that did not exist under the prior ESRTW policies. It is fundamentally inconsistent with the presumption against retroactivity to impose penalties that did not exist during the period of time in question.

Decision No. 1096/11I2 acknowledged the worker's concern that this approach could result in different policies applying to an accident claim which has two or more operating level decisions. In the Vice-Chair's view, however, this potential inconsistency was preferable to inconsistency in the application of policy to the same matter as it proceeds through the appeal process. By applying the policy which is applicable at the time of the particular operating level decision throughout the appeal process for that decision, inconsistency is minimized and the parties can have confidence that an appeal will decide whether the decision was correct according to the policies in place at the time of the decision.

87/12
1364/12

Previous Annual Reports have also noted that the Board did not have a policy on entitlement to LOE benefits for workers who develop occupational diseases after retiring from the workplace. Since LOE benefits are tied to the loss of earnings resulting from a compensable accident, Tribunal cases have held that LOE benefits are not payable to retired workers unless the worker intends to keep working despite his retirement. Following release of these decisions, the Board changed its practice with respect to LOE benefits after retirement. A 2010 Board memo states that, effective 2009, the Board will not pay LOE benefits to workers who are not working and not earning on the date of injury but that LOE benefits already in effect in December 2009, will not be terminated or recalculated. *Decisions No. 87/12*, 2012 ONWSIAT 433, and *1364/12*, 2012 ONWSIAT 1947, considered the 2010 memo but found that, since it did not meet the requirements for section 126 policy in the Board's policy on policy, the Tribunal was not required to apply it. Since there was no applicable policy, *Decisions No. 87/12* and *1364/12* were decided on the basis of the statutory provisions and prior Tribunal cases. Both decisions also applied Tribunal case law that the payment of spousal benefits does not require that the worker be entitled to LOE benefits and that spousal benefits should be based on the statutory minimum in such circumstances. *Decision No. 1364/12* also considered a new argument that the worker's retirement pension could be considered to be "earnings" for the purposes of LOE benefits, but found that the definition of "earnings" in the WSIA generally does not include other disability or retirement benefits.

1878/12

Decision No. 1878/12, 2012 ONWSIAT 2578, is a good example of the importance of considering the governing statutory provisions when interpreting Board policy. At issue was a worker's entitlement to LOE benefits during a strike. *Decision No. 1878/12* held that Board policy on LOE benefits during strikes and walkouts must be read in the context of section 43 of the WSIA. Under section 43, LOE benefits are paid if there is a wage loss that results from the compensable injury. The general rule in the policy is that a worker's benefits status is maintained during the strike or lockout; however, the policy language is discretionary in several respects. This reflects the fact that it is necessary to consider the specific facts of each case and whether there has been a compensable loss of earnings.

Right to Sue Applications

The WSIA and earlier Acts are based on the "historic trade-off" in which workers gave up the right to sue in exchange for statutory no-fault benefits. The Tribunal has the exclusive jurisdiction to decide whether a worker's right to sue has been removed by the Act. Right to sue applications may raise complicated issues such as the interaction between the WSIA and other statutory schemes in Ontario and other jurisdictions.

281/12I

Decision No. 281/12I, 2012 ONWSIAT 1200, involved an action by a plaintiff who was injured in a truck accident in Wyoming while completing a round trip between Ontario

and California. The plaintiff originally applied for statutory accident benefits (SABs) under the Ontario Insurance Act. That matter was settled by mediation. The plaintiff then sued the driver and the transport company that leased the truck. The action was begun in Ontario, but the plaintiff elected to have the laws of Wyoming govern the Ontario action. The insurer applied to the Tribunal for a determination whether the plaintiff's right of action was taken away against the transport company and whether the plaintiff was entitled to claim benefits under the WSIA. *Decision No. 281/12I* decided several preliminary matters in this application, including the Tribunal's jurisdiction. While the Vice-Chair agreed that the laws of Wyoming would be applicable to the court action, this did not exclude the Tribunal's jurisdiction. The plaintiff and defendant driver were residents of Ontario; the defendant transportation company was an Ontario company; the accident occurred during a round trip from Ontario to California and back to Ontario; the action was commenced in Ontario; and there was an application for SABs in Ontario. While the worker may not have claimed benefits under the WSIA, he would have been entitled to do so. The plaintiff's intention to rely on the Wyoming laws was not sufficient to remove the Tribunal's jurisdiction. The fact that the parties reached a settlement under the provisions of the *Insurance Act* regarding SABs also did not negate the Tribunal's exclusive jurisdiction to make orders under section 31 of the WSIA.

Decision No. 281/12I is also of note for its ruling that the use of transcripts from the examination for discovery for the court action did not violate the deemed undertaking rule which precludes the use of evidence for any purpose other than the proceeding in which the evidence was obtained. The Vice-Chair agreed with prior Tribunal decisions that a right to sue application occurs in the context of an ongoing court action and should not be considered a separate proceeding within the meaning of the deemed undertaking rule.

2410/11

Section 28(4) of the WSIA provides an exception to the normal right to sue provisions. The right of action is not taken away if an employer supplied a motor vehicle without also supplying workers to operate the motor vehicle. In *Decision No. 2410/11*, 2012 ONWSIAT 803, the plaintiff argued that once it was found that one employer has supplied a motor vehicle without also supplying workers, section 28(4) applies to the entire application. The plaintiff also submitted that jurisprudence pre-dating the WSIA should not be relied on, since the legislative intent of the WSIA is different because the purpose section of the WSIA identifies compensation and benefits as the fourth and last purpose. The Vice-Chair found that the fact that the WSIA lists the purposes in a certain order and states that all the purposes are to be accomplished in a financially responsible and accountable manner, does not change the underpinnings of workplace insurance legislation. Section 28(4) should be interpreted in the overall context of the statute and the historic trade-off. The foundation of the system is to provide no-fault insurance to workers and to protect employers from law suits. The modern principle of statutory interpretation calls for the statutory words to be read in their entire context in every case, not just in cases where the words seem ambiguous. Accordingly, section 28(4) only exempts the employer that supplied the vehicle.

2407/11

Where a worker claims benefits under the WSIA instead of pursuing a court action, the Board is subrogated to the worker's right of action. *Decision No. 2407/11*, 2012 ONWSIAT 2364, considered a novel argument that an employer should be relieved of its CAD-7 costs because the Board failed to pursue a subrogated action and, by the time the employer was advised that a transfer of costs was not available, the two-year time limit to pursue a cause of action had run. *Decision No. 2407/11* noted that it was in the Board's discretion whether to proceed against a third party and distinguished cases where there was no discretion. The outcome of a court case was also unknown. The employer was essentially asking the Tribunal to award damages to compensate the employer for the Board's administrative errors or delays; however, the Tribunal did not have such jurisdiction.

Employer Issues

Appeals involving employer issues such as classifications, transfers of cost, adjustments of experience rating accounts and Second Injury and Enhancement Fund (SIEF) relief, continue to form a significant part of the Tribunal's case load.

731/12

Decision No. 731/12, 2012 ONWSIAT 1073, considered the interaction between a CAD-7 surcharge and a Workwell surcharge in 2001. Board policy initially stated that, in any single year, no employer should be subject to an amount greater than the highest of the rating surcharge or an assessment under section 91(4) of the pre-1989 Act, which is the authority for the establishment of the Workwell program. A newer policy which was stated to apply on or after June 1, 2000, did not contain this limitation. *Decision No. 731/12* noted that there is a presumption against the retroactivity of substantive policy changes. The newer policy put employers in a position to be liable to increased charges and was a substantive policy amendment which was subject to the presumption against retroactivity. With respect to the effective date of the newer policy, *Decision No. 731/12* found that it came into effect on December 14, 2001, the date of publication. This is consistent with the Board's policy on policy. Accordingly, the earlier policy applied and the employer should only have been subject to the Workwell levy to the extent that it was higher than the CAD-7 surcharge.

503/09

Decision No. 503/09, 2012 ONWSIAT 1048, upheld the Board's jurisdiction under the WSIA, sections 88 and 89, to apply non-compliance interest charges for amounts due when an employer knowingly failed to report a worker's claim as a lost time claim. Board policy states that the Board applies debit interest at the Bank of Canada rate plus 6%. The WSIA gives the Board the discretion to determine the interest rate. There were no exceptional circumstances which would warrant reducing the interest rate. By not reporting claims as lost time claims, the employer received a better CAD-7 rating and premium adjustment. The employer should have been aware of its obligation to report lost time claims.

1060/12

Section 84 of the WSIA allows the Board to transfer the costs of a claim from an accident employer to a third party employer if the accident was caused by the negligence of another Schedule 1 third party worker or employer. *Decision No. 1060/12*, 2012 ONWSIAT 1176, considered an interesting claim for cost relief where a worker suffered an adverse reaction after receiving a flu shot at work. The worker had consented to the flu shot and acknowledged the risks associated with the procedure. The Vice-Chair found that the consent would have negated any responsibility of the third party employer if the worker had experienced a negative reaction for no explicable reason; however, there was evidence that the injection was not done properly. The worker did not consent to treatment that was below the accepted standard of care. The accident employer was entitled to transfer the full cost of the claim to the third party employer.

675/12

When an employer ceases operations, issues about whether experience rating credits should be transferred may arise. An employer company had initially set up two holding companies for the purpose of creating a partnership to operate two plants. The employer company later dissolved the partnership, wound up the two holding companies and assumed ownership of the plants. The Board viewed this as a sale of assets and created new accounts. *Decision No. 675/12*, 2012 ONWSIAT 1275, found that the transaction was effectively a merger of three corporate entities through a winding-up process. Further, the Board had held the employer responsible for the cost liabilities of the

previous accounts, despite the creation of the new accounts. If the liability for costs is transferred, the benefits of experience rating should also be transferred.

Occupational Disease

Occupational disease cases, which involve workplace exposure to harmful processes or substances, raise some of the most complicated legal, medical and factual issues. Occupational diseases are compensable if they fall under the statutory definition of "occupational disease" or "disablement." The WSIA creates statutory presumptions for specified occupational diseases and exposures and the Board has developed policy regarding other exposures and diseases.

2574/1112

Decision No. 2574/1112, 2012 ONWSIAT 314, is an example of the analysis required in an occupational disease case involving a statutory presumption. For the presumption to apply, any requirements set out in the Act or Regulation must be met. If the requirements are not met, the appeal is decided on the usual standard of proof. Primary site colorectal cancer is prescribed in section 4 of Ontario Regulation 253/07 as one of the diseases subject to the presumption for firefighters contained in section 15.1(4) the WSIA. Section 5(1) of the Regulation states the presumption does not apply in respect of primary site colorectal cancer unless the worker was diagnosed with the disease before the age of 61. Under Board policy, the date of accident is the date of earliest evidence of documented medical attention, while the date of diagnosis is the date of earliest medical documentation that establishes the worker's diagnosis. While there was evidence of earlier medical attention, the worker was not diagnosed until after he turned 61. Accordingly, the presumption did not apply. The appeal must now be decided on the usual standard of proof and the matter has been adjourned to obtain a report from a Tribunal assessor.

144/12

The Board has adopted policy on gastrointestinal cancer and asbestos exposure which provides that claims are favourably considered if there is a clear and adequate history of occupational exposure to asbestos dust of a continuous and repetitive nature that represents or is a manifestation of the major component of the occupational activity. This policy was reviewed and its concepts interpreted in a 2009 Occupational Disease Policy and Research Branch (ODPRB) paper. *Decision No. 144/12*, 2012 ONWSIAT 1721, found the interpretation in the research paper to be consistent with and supported by the language in the Board policy. Considering both the policy and the research paper, the Panel found that the worker had moderate and intermittent exposure which did not meet the policy requirements. Considering the merits and justice of the case, the Panel found that recent epidemiological evidence did not support a finding of causal association between working in the steel industry and colorectal cancer. The research suggests there may be a link between colorectal cancer and high, repetitive, continuous asbestos exposure, which was not the situation in this case.

999/10

Decision No. 999/10, 2012 ONWSIAT 176, considered arguments about the standard of proof and causation in a case where the worker developed lung cancer after working in uranium and copper and zinc mines. The Panel found that *Decisions No. 574/05*, 2006 ONWSIAT 1623, and *600/97*, 2003 ONWSIAT 2153, were consistent with the correct application of the significant contributing factor test in occupational disease cases. Epidemiological evidence provides information about the extent of risks associated with an exposure and may lead to inferences about the probability that exposure was responsible for the cancer for persons whose exposure was comparable to the cohort group. Epidemiology does not provide direct evidence about medical causation in a particular case. The criteria in the Board's uranium policy are based on the epidemiological evidence found in the BEIR IV Report that reflects a standard incidence ratio (SIR) of 200. It is important to give individual consideration

to cases which do not meet the policy criteria, since the policy does not attempt to set criteria under which all workers whose cancers have been caused by exposure will necessarily be compensated. In *Decision No. 999/10*, the appeal was denied as the worker's exposure was well below that identified in the policy as persuasive evidence that the cancer is work-related and there was no other significant evidence to indicate a connection between the workplace exposure and the worker's lung cancer.

1778/11

The Board's Adjudicative Support Binder on chronic obstructive lung disease (COLD) has been noted in previous Annual Reports. *Decision No. 1778/11*, 2012 ONWSIAT 186, agreed with *Decision No. 484/06*, 2009 ONWSIAT 2785, that, where COLD results from a combination of cigarette smoking and workplace exposure, there are two separate identifiable components of the injury and it is appropriate to apportion or limit the NEL award to the portion of the impairment arising from the workplace exposure. While the Board's Adjudicative Support Binder on COLD is not Board policy and, therefore, is not binding on the Tribunal, it provides a reasonable and appropriate means of apportioning a COLD impairment between compensable and non-compensable exposures. The Panel rejected an argument that it would discriminate on the basis of disability to reduce the NEL award for the worker's smoking history. The Panel found there was no discrimination. The worker was not being compensated for the portion of the disability which resulted from a non-work injury.

1507/11

Decision No. 1507/11, 2012 ONWSIAT 924, is of interest for its analysis in situations where epidemiological evidence is developing. The worker had exposure to cadmium as a welder and millwright and was diagnosed with prostate cancer at a relatively young age. A report from a Tribunal assessor indicated that, while current epidemiological evidence is not particularly strong, the ability to detect an association is questionable due to various biases unique to cadmium. There is, however, strong experimental evidence supporting the biological possibility of a causal connection. The Panel found that there were unique features which caused it to conclude that workplace exposure made a significant contribution to the worker's prostate cancer, in particular: the relatively young age of onset; the history of occupational exposure in a poorly ventilated environment for 30 years; evidence of potential synergistic effects between exposure to polyaromatic hydrocarbons (PAH) and cadmium; and the lack of family history. The Panel stressed that, given the current state of epidemiological evidence, the decision was made specifically on the facts of the case.

Other Legal Issues

312/12

Issues involving the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code* arose in several cases in 2012. *Decision No. 312/12*, 2012 ONWSIAT 1888, is of particular interest since it is the first to consider the Tribunal's jurisdiction to grant remedies pursuant to section 24(1) of the Charter of Rights since the Supreme Court of Canada decision in *R. v. Conway*, 2010 SCC 22. Conway sets out a two-stage test for determining section 24 jurisdiction: does an adjudicative tribunal have jurisdiction explicitly or implicitly to decide questions of law; if it does, the adjudicative tribunal is a court of competent jurisdiction unless it is clearly demonstrated that the Legislature intended to exclude the Charter from its jurisdiction. In deciding that the Tribunal has section 24 jurisdiction, *Decision No. 312/12* considered recent Tribunal decisions that have found that the Tribunal has jurisdiction to consider Charter questions and similarly has the jurisdiction to apply the Code. The next issue was whether the Tribunal had jurisdiction to grant the requested relief of damages against the Board. *Decision No. 312/12* applied previous Tribunal decisions that have found that the Tribunal does not have jurisdiction to award damages or review Board processes. Accordingly, while the Tribunal had general jurisdiction to

consider granting remedies under the Charter and the Code, it did not have the jurisdiction to grant the remedies requested in this case.

681/10

Decision No. 681/10, 2012 ONWSIAT 1019, considered the worker's Charter and Code challenges to the use of the Combined Values Chart (CVC) in calculating the NEL award. The CVC may result in some reduction of a NEL award where a previous NEL award has been granted. The Combined Values Chart is contained in the AMA Guides, which is the prescribed rating schedule, and reflects the philosophy that all impairments affect the whole person and that all impairments should be expressed as impairments of the whole person. *Decision No. 681/10* found that the idea that all impairments are combined is an integral and fundamental part of the AMA Guides. In deciding whether there is discrimination under section 15 of the Charter, the Tribunal applies the tests established by the Supreme Court of Canada, which consider whether the law creates a distinction based on an enumerated or analogous ground (in this case, disability) and, secondly, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. *Decision No. 681/10* found that the recent decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12, did not change that test but removed the strict requirement of establishing a mirror comparator group.

Decision No. 681/10 agreed with *Decision No. 1657/07*, 2009 ONWSIAT 2737, that the CVC does not create a distinction on the basis of disability on an enumerated ground. The distinction is based on the neutral and rational policy of assessing permanent impairments in accordance with the prescribed rating schedule and not on the basis of disability. Even if there was a distinction on an enumerated ground, the Panel was not persuaded that there was a disadvantage or that it perpetuated prejudice or stereotyping. *Decision No. 681/10* agreed with *Decision No. 1529/04*, 2010 ONWSIAT 1526, that the goal of using an objective measure such as the AMA Guides is to ensure that there is a neutral basis for assessing impairment. The NEL benefit is tailored to the individual worker, whether there is one injury or more than one. The CVC meets the needs of the worker group by providing compensation for permanent impairment using the neutral rating schedule and providing ratings on a whole person basis in a holistic manner. The Panel also concluded that there was no violation of the Code.

1357/07I2

The question of whether WSIA section 43(1)(c) contravenes section 15 of the Charter by limiting LOE entitlement to two years of benefits for workers who are over 63 years of age on the date of injury, has arisen in *Decision No. 1357/07I2*, 2012 ONWSIAT 956. This issue was initially placed in inactive status since the worker wanted to wait for the release of *Decision No. 512/06*, 2011 ONWSIAT 2525, on the same Charter issue. *Decision No. 512/06* has now been released but its holding that there is no Charter breach is subject to an application for judicial review. While the worker would like to wait until the completion of the judicial review proceeding, the employer has expressed concerns about staleness of relevant evidence. *Decision No. 1357/07I2* noted that the Practice Direction on *Procedure When Raising a Human Rights or Charter Question* contemplates that a decision on the merits of an appeal should be made before a Charter issue is heard. Accordingly, it was not necessary to determine whether the Charter issue should proceed before the court proceedings are complete since the matter could proceed on the merits. Given the Charter issue, TCO was asked to refer to the Chair the question of whether a Panel should be assigned before the case proceeds on the merits.

1723/11
1414/12

The Tribunal must periodically decide what weight to give findings in other proceedings. There is a distinction between findings in criminal and civil proceedings since the standard of proof is higher in criminal proceedings. *Decision No. 1723/11*, 2012 ONWSIAT 160, held that it would be an abuse of process for an adjudicative tribunal to relitigate findings of a criminal court. The Vice-Chair considered herself bound by the worker's plea and

the agreed statement of facts relating to the worker's conviction for failure to report a material change in circumstances under section 149(2) of the WSIA. The statement of facts provided that the worker started his own business without notifying the Board and that he failed to complete his LMR program. The Vice-Chair did not consider herself bound by the statement that the worker failed to complete the LMR program, since it was unclear to what extent this was a material change in circumstances. She was, however, bound by the statement that the worker started his own business without notifying the Board. In *Decision No. 1414/12*, 2012 ONWSIAT 1757, the prior decision was that of a Labour Arbitrator who had concluded that the worker's employment had been unjustly terminated. The Panel found that the Labour Arbitrator's decision was persuasive evidence that the worker's dismissal was unjust, but this did not determine the question of whether the compensable injury played a role in the termination of the worker's employment.

2092/11I

Decision No. 2092/11I, 2012 ONWSIAT 1292, considered the common law doctrine of promissory estoppel in the context of an argument that the Board was estopped from terminating FEL benefits or that the Board should pay damages in lieu of FEL benefits based on the Board's failure to advise the worker that benefits would cease at age 65 and failure to provide an interpreter to explain FEL benefits. The Panel found that the doctrine of promissory estoppel does not give the Tribunal jurisdiction to grant a remedy that is not permitted by the WSIA. The Tribunal decides appeals on the merits and does not have jurisdiction over the Board's process. The Tribunal case law has also established that the Tribunal does not have jurisdiction to award damages.

1263/10I
1325/10

Finally, several cases considered the role of the Tribunal's assessors in providing expert evidence to assist in the resolution of a case. The Tribunal's processes are set out in the Practice Direction on *Medical Information Requested By the Tribunal* and the Practice Direction on *Post-Hearing Procedure*. *Decision No. 1263/10I*, 2012 ONWSIAT 2166, discusses the factors to consider in selecting an assessor in the context of a multiple chemical sensitivity appeal. *Decision No. 1325/10*, 2012 ONWSIAT 627, found that the rules governing reply evidence apply equally to a request to bring reply evidence to a report from a Tribunal assessor.

Applications for Judicial Review and Other Proceedings

Judicial Review

The Tribunal was successful on all challenges to its decisions on applications for judicial review in 2012.

The Tribunal has compiled an impressive record on judicial review over its 27-year history. The Tribunal has released over 60,000 decisions, but only once has a final decision of a court quashed a Tribunal decision. Dozens of decisions of the courts have stated that the Tribunal is an expert body and its decisions are deserving of deference. The Tribunal's judicial review record is a demonstration of the excellence of the Tribunal's decisions, and the outstanding work of the Tribunal's adjudicators and staff.

Only judicial review applications where there was some significant activity during 2012 have been included. There are a number of other applications for judicial review not referred to here which have been adjourned for various reasons, and have not been finally concluded.

General Counsel and lawyers from the Tribunal Counsel Office represent the Tribunal in court in most instances and co-ordinate all responses to judicial review applications and other court applications where outside counsel are used.

1 *Decisions No. 774/09*, 2009 ONWSIAT 1004, and *774/09R*, 2009 ONWSIAT 1960

The plaintiff was the resident manager of a residential apartment building. His regular hours were 8 a.m. to 5 p.m., Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day (a Saturday), when the plaintiff was not scheduled to work, the plumber returned. The plaintiff interrupted packing for a trip to accompany the plumber to check to see if the flooding problem was over. While inspecting the drains, the plaintiff was injured when he fell over a piece of wood left by a contractor.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action. The defendant commenced a section 31 application to determine whether the right of action was taken away under the Act.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, the Vice-Chair found he was a worker in the course of his employment when the accident occurred. The Vice-Chair found the plaintiff fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. The plaintiff's counsel originally filed an affidavit with their materials. Following negotiations between counsel, it was agreed to remove the affidavit.

The judicial review was heard in Ottawa on February 3, 2012. The Divisional Court Panel of Justices Hennessy, Matlow and Hambly unanimously dismissed the judicial review application. Noting that the critical issue was whether the accident occurred while the plaintiff was in the course of employment, the Court cited two specific paragraphs of *Decision No. 774/09* in finding the decision was reasonable. The Court held: "We are satisfied that, in arriving at this finding, the [Tribunal] correctly applied the "place, time & activity" test & that its finding was supported by the evidence."

2 *Decisions No. 1976/99I* (November 30, 1999), *1976/99*, 2002 ONWSIAT 2631, and *1976/99R*, 2005 ONWSIAT 1950

The worker was granted entitlement on an aggravation basis for fibromyalgia from March 1991 until February 1992. Seven months later, the medical evidence showed the worker's condition had improved so she had only minor symptoms. She was expected to fully recover. In November 1991, the worker notified the Board she had recovered. For three years the worker did not see a doctor for her injury and made no further claim to the Board. Abruptly, in November 1994, she notified the Board and her doctor that she was claiming further benefits for fibromyalgia, which she related to her work injury three and a half years earlier. The Board denied further benefits. The worker appealed to the Tribunal.

The Panel denied further entitlement on the grounds that the worker was suffering from regional myofascial pain, rather than fibromyalgia.

A different Vice-Chair in the first reconsideration decision held the Panel may have been mistaken, since both conditions fell under the Board's chronic pain policy. However, he also held that even if the worker continued to suffer from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker was disabled by a work injury, the medical reporting did not relate her condition to work, there were significant discrepancies in the medical reporting, and her allegation that her condition worsened from 1991 to 1994 suggested there was another intervening cause of her disability.

The worker brought six further reconsiderations applications, all of which were denied. She then commenced an application for judicial review. The worker served her factum. Her factum was improper and in the Tribunal's view should not have been accepted by the Ottawa Divisional Court. The Tribunal raised this with the Ottawa Divisional Court, and on October 12, 2010, Justice Linhares de Sousa directed that the worker's factum be returned to the worker, with instructions that the worker must seek authorization from a single justice of the Divisional Court to file such a factum.

On March 4, 2011, the worker's motion to be allowed to file a 55-page factum was heard by Justice Smith in Ottawa. Her request was not granted, but the Court did grant her 60 days to file a 45-page factum. The Tribunal was granted the right to file a 45-page factum in reply.

The judicial review was heard in Ottawa by Justices Aston, Whitten and Corbett on April 19, 2012. The judicial review was unanimously dismissed. Justice Aston, who wrote the decision, noted: "It is not our task to review and weigh the evidence nor to substitute our opinion for that of the Tribunal... The applicant has not established any basis upon which judicial intervention is warranted. The reasons for the decision meet the need for justification, transparency, and intelligibility as set out in Dunsmuir and the decision itself falls within the range of reasonable outcomes."

3 *Decisions No. 3164/00*, 2000 ONWSIAT 3599, *3164/00R*, 2001 ONWSIAT 1067, and *3164/00R2*, 2012 ONWSIAT 501

The worker worked in a donut shop. She injured her back in 1994. She was paid total benefits for about a month, then returned to work, and went off again for a further seven months. In September 1997, she was fired. In October 1997, she was granted entitlement for a right elbow disability arising out of her job duties.

The worker appealed for entitlement for a FEL award and further vocational rehabilitation arising out of the back injury. She also appealed ongoing entitlement for the right elbow condition. Finally, she appealed for entitlement for fibromyalgia, which she alleged arose out of either the back or the elbow injury.

In *Decision No. 3164/00*, released in December 2000, the Vice-Chair granted entitlement to a FEL award and vocational rehabilitation assistance for the back injury. The Vice-Chair denied entitlement for fibromyalgia and the right arm/elbow.

On the first reconsideration the worker submitted additional medical documentation in support of her claim for fibromyalgia. However, the Vice-Chair found it was insufficient to warrant reopening the appeal. The worker made five more reconsideration requests which the Tribunal Chair found did not meet the threshold to be assigned for review by another Panel or Vice-Chair.

In January 2011, the worker retained new counsel and commenced an application for judicial review. The Tribunal expressed concern about the timeliness of this application, which was commenced 10 years after the Tribunal's initial decision. In May 2011, the worker's counsel asked if the Tribunal would consent to adjourn the judicial review while the worker pursued a seventh reconsideration. The Tribunal agreed.

In *Decision No. 3164/00R2*, released on March 6, 2012, a different Vice-Chair denied the further application for reconsideration. In this instance, the Vice-Chair was also not persuaded by the additional medical evidence. He noted that the evidence submitted in support of the reconsideration was actually reply evidence, obtained in an attempt to refute the Tribunal's conclusion, rather than new evidence. Further, he did not find the additional evidence demonstrated that the original decision should be reconsidered.

The worker decided to proceed with the judicial review. The Tribunal served a supplementary record, and the worker and the Tribunal filed their factums. The Tribunal also brought a motion to dismiss the judicial review for delay. The motion and judicial review were scheduled to be heard on December 5, 2012.

The Divisional Court Panel of Justices Aston, Hackland and Lederer unanimously granted the Tribunal's motion to dismiss for delay. The Court noted that the judicial review was commenced 18 years after the initial injury, 15 years after the second injury, and 10 years after the Tribunal's original decision. There was a three-year gap between the Tribunal's sixth reconsideration and the commencement of the judicial review. In exercising its discretion, the Court took into account the length of the delay, the lack of a reasonable explanation for the delay, and the prejudice suffered as a result of the delay due to the destruction of the hearing tapes and the integrity of the process.

Just prior to the end of the year, the worker filed a notice of application for leave to appeal the Divisional Court's decision.

4 *Decisions No. 1791/07*, 2007 ONWSIAT 2212, *1791/07R*, 2008 ONWSIAT 634, and *1791/07R2*, 2009 ONWSIAT 2214

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psychotraumatic disability, and the amount of the NEL award for chronic pain. The Tribunal held that the worker had no entitlement for carpal tunnel syndrome, that he was not entitled to a psychotraumatic award, and that he was not entitled to an increase in his NEL award.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by *Decision No. 1791/07R2* on September 21, 2009.

The worker revived his application for judicial review. The application was heard in June 2010, by a Divisional Court Panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the worker's lawyer abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome.

Although the time to seek leave to appeal a decision of the Divisional Court is 15 days, over eight months later the worker brought a motion to extend the time to seek leave to appeal to the Court of Appeal. The Tribunal opposed the extension.

On March 30, 2011, Karakatsanis J.A. (as she then was) denied the time extension. She noted there was no evidence the applicant had formed the intent to seek leave to appeal within 15 days, the delay here was significant, the applicant's allegations about illness and being unable to find counsel were unsubstantiated and not compelling, there would be prejudice to the Tribunal if an extension was granted, and in any event there was no merit to the appeal.

Over a year later, the worker then asked the Supreme Court to review the decision of Karakatsanis J. The Supreme Court Registrar was of the view that there was no final order of the Court of Appeal and that the Supreme Court therefore had no jurisdiction. He suggested that the worker's recourse was go back to the Court of Appeal to try to have the order of Karakatsanis J. reviewed by a three-member Panel of the Court of Appeal. However, when the worker went back to the Court of Appeal, he was out of time to ask for such a review and so had to ask the Court of Appeal to extend the time in which to ask a three-member Panel of the Court of Appeal to review the order of Karakatsanis J. The Tribunal opposed the worker's time extension request and filed a factum.

On July 12, 2012, the Court of Appeal dismissed the worker's time extension request. Justice Laskin noted that the Court of Appeal's Rules require that motions for review be brought within four days of the challenged decision. He set out the factors to be considered in deciding motions to extend time. He found that, even excusing the worker's error in initially bringing his matter to the Supreme Court, he did not bring his motion to the Supreme Court until 12 months after Karakatsanis J.A.'s decision. Justice Laskin found that, in light of the absence of prejudice to the Tribunal, he would be inclined to discount the importance of the lengthy unexplained delay if he saw any merit in the worker's proposed appeal. However, he found no merit in the appeal, even assuming that the worker would be allowed to revive the claim for psychotraumatic disability that he abandoned before the Divisional Court. Justice Laskin noted that the Tribunal considered all of the medical evidence. The Tribunal simply reached a different conclusion on the medical evidence from the conclusion the worker argues for. Justice Laskin found that the submission that the Tribunal's decisions are unreasonable is not even arguable.

The worker then brought a motion before a panel of three judges to review Justice Laskin's order. The Tribunal opposed the motion and filed a factum.

On September 26, 2012, the Court of Appeal (Justices MacPherson, Blair and Armstrong) dismissed the worker's motion, with costs to the Tribunal fixed at $500. In brief reasons, the Court stated that it agreed with Laskin J.A.'s analysis and order, and also agreed with Karakatsanis J.A.'s underlying decision.

The worker then brought an application to the Supreme Court of Canada, seeking leave to appeal the September 26, 2012 decision of the Court of Appeal. At the end of the year the decision of the Supreme Court of Canada was pending.

5 *Decisions No. 512/06I*, 2007 ONWSIAT 164, and *512/06*, 2011 ONWSIAT 2525

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker LOE until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date of the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002, for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003 (which was two years after the injury), pursuant to section 43(1)(c) of the WSIA.

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened section 15(1) of the *Canadian Charter of Rights and Freedoms*.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as intervenors. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of section 15 the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates section 15 of the Charter to be (a) if the Act creates a distinction based on an enumerated ground, and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65, that age 65 is still when most people retire, and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two-year statutory limit. Further, a two-year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65

are eligible for other sources of income, such as CPP. Viewed contextually, the majority found the two-year limit does not perpetuate prejudice of workers aged 63 and older. Even if section 43(1)(c) did violate section 15 of the Charter, it constituted a reasonable limit under section 1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that section 43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that section 43(1)(c) was not saved under section 1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

At the end of the year the worker had filed a request for reconsideration. Since the original Tribunal Vice-Chair has passed away, a new Vice-Chair will need to be assigned to hear the reconsideration.

6 *Decisions No. 1110/06*, 2006 ONWSIAT 2463, *1565/08I*, 2008 ONWSIAT 2055, *1565/08*, 2008 ONWSIAT 1128, and *1565/08R*, 2011 ONWSIAT 323

The worker injured his back at work in June 1990. He was granted temporary benefits and an 18% NEL award. He was granted a FEL sustainability award at D1 in 1992. He was also granted a FEL supplement while he participated in a vocational rehabilitation program. He was undergoing a retraining program to become a civil engineering technician when he was involved in a motor vehicle accident in 1993, forcing him to quit the program.

At R1 in 1994, the worker was granted a FEL award based on earnings which assumed he had been able to complete the training program.

In 1997, the Board ruled that the worker had recovered from the 1990 accident and his ongoing back problems were actually the result of a pre-existing back condition. The worker's entitlement was revoked retroactive to September 1990.

The worker appealed to the Tribunal.

In *Decision No. 1110/06*, the Tribunal determined the worker's pre-existing condition had been asymptomatic at the time of the 1990 injury, so the work injury was a significant factor contributing to the worker's ongoing impairment. The Panel held the worker had ongoing entitlement, that he had a permanent impairment, and that the entitlement to benefits he had at the time of the 1997 Board decision should be restored. The Board was directed to reinstate the worker's benefits and determine his past and ongoing benefits.

Following *Decision No. 1110/06*, in 2007, the Board made a new FEL determination. The Board found the worker was only partially disabled because of his work injury, and his inability to work was due to the 1993 motor vehicle accident. The Board reinstated the NEL award, but did not grant a full FEL award. The Board awarded a smaller FEL award starting in 1993 as it determined he could have worked as a civil engineering technician but for the non compensable motor vehicle accident. The worker appealed to the Tribunal again.

In the new appeal, the *Decision No. 1565/08I* Panel spent the first day of hearing considering the role of a person who appeared at the hearing with the worker and who characterized herself as a "facilitator." Following a lengthy discussion, it was decided that this person would characterize herself as a "friend" of the worker. As a friend she would qualify under the exemption for a representative as set out in By-Law 4 passed pursuant to the *Law Society Act*. However, the Panel brought the circumstances of the case to the attention of the Tribunal Chair.

When the hearing reconvened the Panel considered the worker's arguments that he was totally disabled before his motor vehicle accident and, hence, he was entitled to a full FEL award.

In *Decision No. 1565/08*, the Panel found the worker was not totally disabled before the motor vehicle accident. Further, the motor vehicle accident had a significant impact on the worker. The Panel found that the worker's inability to earn beyond the level determined by the Board was because of the motor vehicle accident. As a result the Panel upheld the worker's D1 and R1 FEL award as determined by the Board.

However, at the R2 date the Board had found the worker would have been able to earn the average earnings of a fully qualified civil engineering technician and, hence, have a lower FEL award. The Panel allowed the worker's appeal in part on that issue, finding he would only have been able to make entry level earnings. Thus, the worker was entitled to a partial FEL award commencing in 1993. The Panel also confirmed the Board's NEL determination.

In *Decision No. 1565/08R*, a different Vice-Chair denied the worker's application to reconsider *Decision No. 1565/08*, finding the threshold to reconsider had not been met.

The worker commenced an application for judicial review of *Decisions No. 1565/08* and *1565/08R*. The worker is self-represented. The Notice of Application for Judicial review contains a myriad of allegations of breaches of natural justice, bias, and decisions made on no evidence. The Notice of Application also alleges that the second Panel was barred from making certain findings in light of the conclusions in the earlier decision, *Decision No. 1110/06*.

In light of the allegations in the Notice of Application and pursuant to its usual practice, the Tribunal asked the worker to order the transcripts of the Tribunal hearings for the Record of Proceedings. The worker refused. The Tribunal ordered the transcripts itself, and filed a Record of Proceedings which included the transcripts.

The worker brought a motion for an order to remove the transcripts from the Record, and to remove many of the materials pertaining to *Decision No. 1110/06*. The motion was heard in September 2011, by Madam Justice Swinton. The Tribunal filed a factum for use on the motion.

Following oral argument by the worker and Tribunal Counsel, Justice Swinton dismissed the worker's motion, accepting the Tribunal's arguments that, in the light of the allegations contained in the Notice of Application, the transcripts and materials from the prior appeal are properly included in the Record of Proceedings. Costs in the cause were awarded to the Tribunal.

The Divisional Court Registrar later dismissed the worker's judicial review because he failed to file his factum and perfect his application within a year of filing the judicial review. The worker brought a motion to set aside Registrar's dismissal and to extend the time to file his factum. The Tribunal did not consent to the motion, but also did not oppose it. On June 20, 2012, the motion was granted.

The worker delivered his factum in July 2012. The Tribunal delivered its factum in August 2012. The hearing of the judicial review was scheduled for December 2012, but was adjourned at the request of the worker's counsel, who had recently been retained by the worker to attend for the hearing of the application. A new date has not yet been set for the hearing.

7 *Decision No. 2484/11*, 2012 ONWSIAT 340

The worker injured her wrist at work in 2006. She then stopped work in 2007 when she was diagnosed with tenosynovitis in the same wrist. She appealed entitlement to LOE benefits from September 2007 to February 2008, and from March 2008. The Vice-Chair allowed the worker's appeal in part, finding she was entitled to full loss of earnings benefits from September 2007 to October 2007, but not after that date.

However, the Vice-Chair also found on the evidence that the worker had failed to accept suitable work offered by the employer. Even though the worker was subsequently granted entitlement under the chronic pain policy, the Vice-Chair found this did not mean she was incapable of performing the work offered.

The worker commenced a reconsideration application, and then withdrew it to start an application for judicial review. The worker argues that she was entitled to notice of the consequences of her refusal to accept modified work, in accordance with insurance principles. The applicant has filed her factum, and at the end of the year the Tribunal was preparing its responding factum.

8 *Decisions No. 2175/10*, 2010 ONWSIAT 2538, and *2175/10R*, 2011 ONWSIAT 1640

The worker appealed for initial entitlement for injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported, and the nature of the injuries.

The worker has commenced an application for judicial review. The worker filed an affidavit with his factum, which the Tribunal has objected to. At the end of 2012, the Tribunal was preparing a responding factum. It is expected that this judicial review will be heard early in 2013.

9 *Decisions No. 834/09*, 2010 ONWSIAT 1816, and *834/09R*, 2011 ONWSIAT 902

In this right to sue application, the applicants sought determinations as to whether the rights of action of Ms. M and Ms. R were taken away by the Act. Both Ms. M and Ms. R suffered serious injuries in a motor vehicle accident that occurred on November 18, 2005, when their van, driven by Ms. M, spun out while they were travelling on a highway. After the van came to rest, both Ms. M and Ms. R exited the van. While they were at the rear of the van, another driver, Mr. K, lost control his van near the same location where Ms. M had lost control of the van she was driving. Both Ms. M and Ms. R were struck by Mr. K's van, and suffered severe injuries including the amputation of one leg each.

Ms. M was scheduled to work the morning of the accident. She attended the offices of A (the company) and delivered flowers to a synagogue. She loaded up the van with items to be delivered to a banquet hall for the next day's event.

Ms. R was not scheduled to work the day of the accident. She attended at A, the company's office, in the morning to collect her pay cheque. She intended to then meet her mother for lunch. Ms. M offered to drive Ms. R to the restaurant. They left the company's offices together in the van. After leaving the office, they stopped at the company's storage facility, where they loaded additional items for an upcoming event. The accident happened some time after leaving the storage facility.

Ms. M, Ms. R and their family members brought actions against various individuals and entities. The right to sue application was brought by the sole proprietor of the company, and the company from whom the van was leased, with a co-application brought by Mr. K and his company and the owner of his van, and the company which maintained the highway.

A, the company, was not registered with the Board at the time of the accident.

At issue in the application was: whether A was a Schedule 1 employer; whether Ms. M and Ms. R were workers or independent contractors and whether they were in the course of their employment at the time of the accident; whether Mr. K was acting in the course of his employment at the time of the accident; and whether, if the actions of Ms. M and/or Ms. R were taken away, the *Family Law Act* (FLA) claims were also taken away by the WSIA.

The Vice-Chair found that it was not necessary to decide A's classification, but rather whether A, a party décor business, was a Schedule 1 employer at the time of the accident. She found that while the words "party décor" are not specifically included in Schedule 1, the various components that make up party décor are found in Schedule 1. She found that A was compulsorily covered under Schedule 1.

The Vice-Chair found that both Ms. M and Ms. R were workers of A at the time of the accident. However, she found that Ms. M was in the course of her employment at the time of the accident, while Ms. R was not. She further found that Mr. K was in the course of his employment at the time of the accident.

The Vice-Chair concluded that Ms. R's action and that of her FLA claimants, was not taken away by the WSIA. However, she found that Ms. M's action against the sole proprietor, Mr. K, Mr. K's employer, and the company which maintained the highway was taken away by the WSIA. The right of action of the FLA claimants in Ms. M's action was not taken away by the WSIA.

The Vice-Chair made no determination with respect to rights of action against the highway and the Ontario Ministry, as they did not participate in the application.

Both Ms. M and the applicants made requests for reconsideration of the decision. The reconsideration requests were denied.

Ms. M then commenced an application for judicial review, seeking a declaration that, at the time of the accident: 1) A was not a Schedule 1 employer; 2) Ms. M was not a "worker" as defined by the *Workplace Safety and Insurance Act*; and 3) Ms. M was not in the course of her employment.

The Tribunal sent several follow-up requests to the applicant's counsel to provide transcripts so that the Tribunal could prepare and file the Record of Proceedings. The applicant's counsel failed to respond and ultimately the Tribunal filed the Record without the transcripts. The applicant's counsel then filed the transcripts separately.

The applicant's counsel delivered a factum in December 2012. At the end of the year the Tribunal was in the process of preparing its factum.

10 *Decisions No. 10/04*, 2010 ONWSIAT 984, *10/04R*, 2004 ONWSIAT 2779, *10/04R2*, 2005 ONWSIAT 1961, and *10/04R3*, 2012 ONWSIAT 36

The worker was injured in July 1986. He was paid total disability benefits until he returned to work in December 1986. In December 1987, he claimed he suffered a new injury. He was paid total disability

benefits until May 1989, when he was granted a 7% permanent disability pension. He was paid a section 147(4) supplement from November 1989 until November 1991, when the Board terminated the supplement.

He was (following an appeal to WSIAT and the release of *Decision No. 1564/00*, 2000 ONWSIAT 2432) granted a section 147(2) supplement from November 1991 until March 1995. The Board sponsored the worker to attend university from 1995 to 1998, during which time he received section 147(2) benefits.

By 2000, the worker's pension had increased to 15%.

The worker asked the Board for section 147(2) benefits from November 1989 to November 1991. The Appeals Resolution Officer (ARO) denied the appeal for section 147(2) benefits on the basis that the worker was not involved in Board-approved VR activities between 1989 and 1991.

In another ARO decision, the worker was denied section 147(4)(b) benefits after August 9, 1998.

The worker appealed to WSIAT, seeking: a section 147(2) supplement from November 1, 1989 to November 1, 1991; a section 147(4) supplement after August 9, 1998; and a finding that he sustained a new accident in December 1987, rather than a recurrence of the 1986 injury.

At the worker's request, his appeal was considered as a written case.

In *Decision No. 10/04*, the Vice-Chair held: the worker was entitled to a section 147(2) supplement rather than a section 147(4) supplement from November 1, 1989 to November 1, 1991; the worker was not entitled to a section 147(4) supplement after August 9, 1998; and the December 23, 1987 incident was a recurrence.

In regards to the period from November 1989 to November 1991, the Vice-Chair found that the Board erred in characterizing the section 147(4) benefits granted during this time as a "temporary" supplement, given the mandatory language contained in section 147(7). However, the Vice-Chair found that the Board's initial decision to award the section 147(4) benefit was in error because during that period, the worker was participating in a VR program; therefore, as of that date he should have been awarded a section 147(2) supplement rather than a section 147(4) supplement.

In regards to section 147(4) benefits after August 9, 1998, the Vice-Chair noted that the worker had already completed a vocational rehabilitation program and had an earning *capacity* (as opposed to his actual earnings) that approximated his pre-accident earning capacity under section 147(2). Consequently the worker was not entitled to a section 147(4) supplement after August 1998.

The worker asked the Tribunal to reconsider *Decision No. 10/04* on the grounds that the Tribunal had no authority to terminate a section 147(4) supplement, that in regard to the period after August 1998, the Tribunal had failed to consider the increase in the worker's permanent pension, and that the December 23, 1987 accident was a new accident rather than a recurrence.

The Vice-Chair denied the reconsideration. He found the worker should never have received a section 147(4) supplement in the first place, because the evidence demonstrated that as of 1989 the worker would have benefitted from vocational rehabilitation. Accordingly he should have received a section 147(2) supplement, which was what the Vice-Chair had granted. A worker cannot receive both a section 147(2) and a section 147(4) supplement at the same time. The Vice-Chair held the Tribunal has jurisdiction to determine eligibility for a section 147(4) supplement, though it may not be rescinded once entitlement is established.

The Vice-Chair also found the increase in the worker's pension was taken into account in the original decision, and that the December 1987 accident was a recurrence rather than a new accident.

The worker's application for a second reconsideration was denied by the same Vice Chair in *Decision No. 10/04R2*. In regards to the period from November 1989 to November 1991, the Vice-Chair confirmed that the Tribunal may find that section 147(4) benefits can be rescinded where they should never have been granted. Here the worker was entitled to section 147(2) benefits because he could have benefitted from vocational rehabilitation services.

The worker's applications for six further reconsiderations were denied by the Tribunal Chair. The worker retained counsel and commenced a ninth reconsideration application. Submissions made on behalf of the worker alleged a breach of procedural fairness, in that the original Vice-Chair did not notify the worker that his section 147(4) benefits for the period November 1989 to November 1991, were at risk in the appeal.

In *Decision No. 10/04R3*, the new Vice-Chair denied the application for reconsideration. In his reasons, the Vice-Chair stipulated that he was only considering the procedural fairness arguments, which had not been raised in prior reconsideration applications. These were: whether the Vice-Chair committed a procedural error in not giving the worker notice that his initial entitlement to section 147(4) benefits would be an issue under consideration; whether the Vice-Chair committed a procedural error in not advising the worker of the downside risk arising from his request for section 147(2) benefits from November 1, 1989 to November 1, 1991; and, if either of these errors did exist, whether correcting them would likely produce a different result.

In regards to notice, the Vice-Chair acknowledged that initial entitlement to section 147(4) benefits was not identified in the list of issues in *Decision No. 10/04*, and the worker and employer were not given an opportunity to provide submissions on this issue. However, the parties were made aware that section 147 was in issue, and that should have been sufficient to put the parties on notice that the interplay between the different parts of section 147 were within the scope of the appeal. Section 147 is a comprehensive scheme of supplementary benefits for a permanent impairment, and its provisions cannot be read on a compartmentalized basis. Where a worker has claimed section 147(2) benefits, it is not reasonable to argue that the Tribunal is precluded from considering section 147(4) benefits for the same period. In any event, the notice question is no longer relevant as the worker had received two detailed reconsideration decisions.

In regards to downside risk, the Vice-Chair held there was no downside risk for the worker when he claimed section 147(2) benefits for the period November 1989 to November 1991. He noted that the original Vice-Chair did not remove the applicant's entitlement to section 147 supplementary benefits for the period of November 1, 1989 to November 1, 1991. Rather, he simply found that the applicant was entitled to those benefits on the basis of section 147(2) and not section 147(4). Not only was the worker's appeal on the issue granted, his benefits were increased for that period. It was not reasonable to characterize this result as a downside risk.

Following the release of this decision, the worker commenced an application for judicial review. The worker is self-represented. He has filed a factum, and the Tribunal has filed its factum. The Tribunal had been verbally advised by the Divisional Court that the judicial review will be heard in June 2013.

11 *Decisions No. 1093/11*, 2011 ONWSIAT 1801, and *1093/11R*, 2011 ONWSIAT 2848

The worker injured his back in 1986. He injured his shoulder in 1993. Tribunal *Decision No. 1022/02R3*, 2007 ONWSIAT 2461, found the worker was entitled to benefits for his shoulder on a disablement basis. The Board then granted entitlement to an LMR assessment to identify an appropriate suitable employment or business (SEB). An ARO decision found the SEB was a retail trade manager, and based the worker's temporary disability benefits and his FEL award on a deemed mid-entry

wage level for this SEB. The worker appealed to the Tribunal, alleging the SEB was not suitable, and the deemed wages were too high.

The worker's appeal was denied. The Vice-Chair found that the SEB of retail trade manager was appropriate because it included the job the worker had been doing since 2000. The worker was operating his own small store. This employment was suitable given the worker's restrictions and his vocational background.

The Vice-Chair also found that the deemed wages were suitable. Even though benefits are usually calculated based on actual wages, since the worker was self-employed the actual earnings did not reflect his actual wages. The worker lived above his store in Quebec, and used the store's vehicle and food. He paid his spouse a salary. The Vice Chair also found it was appropriate to use the Ontario-based wage calculation even though the worker now resided in Quebec.

The worker's application for reconsideration was denied. The worker argued the Vice Chair was biased towards the worker because she questioned the accuracy of the worker's tax returns, and that the Vice-Chair failed to consider factors that would suggest the earning capacity should have been based on higher wages. The Vice-Chair found that there was no reasonable apprehension of bias, as she had not suggested the applicant cheated on his tax returns as the worker alleged. *Decision No. 1093/11* relied on Tribunal jurisprudence in calculating appropriate earnings for self-employed workers, and this does not demonstrate bias. Further, the Vice-Chair pointed out that she had found the Board's calculation, which was based on average rather than high end wages, was appropriate.

In June 2012, the applicant commenced an application for judicial review. The Tribunal has filed a Record of Proceedings and is waiting to receive the applicant's factum.

12 *Decision No. 2410/11*, 2012 ONWSIAT 803

A plaintiff was struck by a pickup truck that was clearing snow in her employer's lot. The truck was driven by GB and owned by FB. She commenced an action against GB and FB, who were brothers involved in the snow clearing business. She also sued D, the company that leased the truck to them. The leasing company applied to the Tribunal for an order taking away the right of action against the brothers. The Vice-Chair held that the right of action was not taken away against any of the defendants.

A representative for the plaintiff's employer attended the hearing as an observer. Following the hearing, the representative contacted the Tribunal and supplied a copy of the snow removal contract. Neither the plaintiff or respondent objected, so the contract was admitted and relied upon by the Vice-Chair in her decision.

The issues were whether the plaintiff was in the course of her employment at the time of the accident, whether section 28(4) of the WSIA took away the right of action against all defendants, and whether GB was a worker in the course of employment.

The Vice-Chair considered the contract which had been admitted after the hearing, and concluded that the employer owned the parking lot and controlled its maintenance. The Vice-Chair referred to prior Tribunal decisions which have generally held that a worker is found to be in the course of employment if the worker was in an employer-controlled parking lot while coming to work, as this is reasonably incidental to employment. She held the plaintiff was in the course of her employment when she was injured.

However, section 28(4) of the WSIA provides that a right of action is not taken away if any employer, other than the worker's employer, supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers. Here the snow removal truck was rented and D, the leasing company, did

not provide workers, so the plaintiff's right to sue was not taken away against D. The issue was whether the right of action was taken away against GB and FB, neither of whom participated in the hearing.

The Vice-Chair followed previous Tribunal decisions which have held that the section 28(4) exemption only applies to the employer who supplied the vehicle without also supplying workers, that is, the employer who supplied the vehicle without also supplying workers is the only entity against whom the action may proceed. Other employers and workers are still protected from suit. As stated in *Decision No. 1785/04*, 2007 ONWSIAT 2968 [at para. 79]: "The removal of the right to sue applies to employers who had workers in the course of employment at the time of the accident, but not to employers who do not have that essential compensation nexus."

However, the Vice-Chair found on the evidence, including the contract that was submitted after the hearing, that because GB was an owner and was driving the truck at the time of the accident, GB and FB were not workers acting in the course of their employment. Hence the right of action was also not taken away against GB and FB.

D, the leasing company, has commenced an application for judicial review of *Decision No. 2410/11*. The applicant is amending its materials to include the Tribunal as a named party, following which the Tribunal will file its Record of Proceedings.

Other Legal Matters

Human Rights Tribunal of Ontario

Case #1

A worker was unhappy with her WSIAT decision. She brought an application to the Human Rights Tribunal of Ontario (HRTO), alleging discrimination on the basis of disability, sex and family status. The worker characterized her application as being about services, rather than the WSIAT decision itself.

WSIAT took the position that the worker's application had nothing to do with services, that it was in fact an attack on the merits of the WSIAT decision, and that the HRTO had no jurisdiction to consider an appeal of WSIAT's decision.

The HRTO Vice-Chair agreed that most of the worker's submissions appeared to relate to the results of the WSIAT decision and WSIAT's adjudicative process. However, the HRTO Vice-Chair was unable to conclude that it was plain and obvious that the application did not fall within the HRTO's jurisdiction. She directed the worker to file a more detailed statement of the alleged discrimination, which was to be provided to WSIAT.

WSIAT declined to file a complete response to the application. It filed a Request for an Order During Proceedings to dismiss the application on the grounds that the HRTO had no jurisdiction to consider the subject matter of the allegations. In the alternative WSIAT requested the application be deferred until the worker's request for reconsideration of the WSIAT decision had been completed.

On March 8, 2011, the HRTO Vice-Chair granted WSIAT's request and dismissed the application on the basis that the HRTO had no jurisdiction to consider any of the allegations except for one, and for that allegation she agreed that it should be deferred until after the WSIAT reconsideration.

In November 2011, the worker wrote to the HRTO, alleging that WSIAT had closed her reconsideration. She asked for an Order During Proceedings to reactivate her original complaint. The HRTO asked her to clarify

her allegation, and the HRTO Registrar sent a letter to WSIAT instructing WSIAT not to respond until the HRTO provided further direction.

There was no further communication from the HRTO, until WSIAT received a Case Assessment Direction from an HRTO Vice-Chair, stating WSIAT had failed to respond within the time limit and ordering WSIAT to explain what the status of the worker's reconsideration was.

WSIAT requested the HRTO reconsider its finding that WSIAT failed to respond within the time limit. WSIAT simultaneously filed submissions demonstrating the extensive efforts that had been made to process the worker's reconsideration over the past year, and argued that any delay was due to the worker withdrawing her own reconsideration and that her letters were difficult to understand. WSIAT again noted that the HRTO has no supervisory jurisdiction over WSIAT decisions.

In an Interim Decision dated March 14, 2012, an HRTO Vice-Chair agreed that the HRTO Registrar had directed WSIAT not to respond unless directed, and no such direction had been provided by the HRTO to WSIAT.

The HRTO Vice-Chair also held that it was not necessary to obtain further submissions from WSIAT. She agreed the WSIAT reconsideration process had not concluded, and there was no basis to revive the worker's Application. The worker's Request was denied.

In April 2012, the worker filed another Request to reactivate her HRTO Application.

The HRTO Registrar responded that, as the worker had not given any indication that the WSIAT reconsideration process had been completed, nor provided a copy of an order or decision from the WSIAT proceeding, the worker's Request would not be considered at that time.

In August 2012, WSIAT issued a decision denying the worker's reconsideration request.

The worker subsequently filed a further Request to reactivate her HRTO Application.

WSIAT took the position that the worker's HRTO Application should not be reactivated because the worker had commenced another proceeding before WSIAT, namely a Right to Sue Application. The worker's Right to Sue Application arose from the same facts and events that gave rise to the worker's initial WSIAT appeal and subsequent reconsideration request. Therefore, WSIAT argued that the HRTO's reasoning in deferring the worker's HRTO Application still applies.

In September 2012, the worker filed another Application with the HRTO. This Application also names WSIAT as the respondent.

The HRTO issued an interim decision in October 2012, reactivating the worker's Application. The HRTO Vice-Chair directed that a summary hearing be held to determine whether the Application should be dismissed on the basis that there is no reasonable prospect that the worker will be able to establish, on a balance of probabilities, that a failure to offer to pay for child care resulted in an infringement of the applicant's Code-protected rights.

The HRTO Vice-Chair also directed the worker to make submissions at the summary hearing, on her recent Application and to explain what it relates to.

A summary hearing via teleconference was proposed, but counsel for WSIAT requested an alternative date. As the parties were unable to agree on a new date, the HRTO requested the worker to confirm a new date from the list provided by the Tribunal. At the end of the year the worker had not yet confirmed a new date.

Case #2

A worker brought an application to the HRTO alleging discrimination in the provision of services based on disability. The worker also alleged violations of sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*. The worker named both the WSIB and WSIAT as respondents.

The worker alleged that, while she was attending a program for employment search offered by the WSIB, she was improperly assessed and given an improper accommodation plan which furthered her injuries. The worker also alleged that the WSIB coerced her family doctor to refer her to a WSIB psychiatrist, against her wishes.

In a Case Assessment Direction dated July 4, 2012, the HRTO directed that a summary hearing be held to determine whether the Application should be dismissed on the basis that there is no reasonable prospect that it would succeed.

WSIAT filed written submissions. WSIAT took the position that the Application should be dismissed because the worker missed the statutory time limits to file an application. In the alternative, WSIAT requested to be removed as a party to the Application as the worker made no allegations of violations of the *Human Rights Code* against WSIAT.

A summary hearing via teleconference was held on November 22, 2012. At the summary hearing, the worker's representative made new allegations against WSIAT, claiming WSIAT had breached the Code because WSIAT has a supervisory jurisdiction over the Board, and WSIAT should have issued a "summary ruling" that the Board had breached the Code. He also said WSIAT should have laid charges against the Board.

In a decision dated December 27, 2012, the HRTO Vice-Chair accepted TCO's arguments, finding WSIAT has no authority to issue a summary decision, that WSIAT has no authority to lay charges against the WSIB, and that WSIAT has no supervisory jurisdiction over the Board. WSIAT also pointed out that the worker's appeal at WSIAT has not concluded. The HRTO Vice-Chair dismissed the complaint against WSIAT as there was no reasonable prospect of success.

The HRTO Vice-Chair also dismissed the complaint against the WSIB. The Vice-Chair found that no breach of the Code had been established, because the HRTO had no jurisdiction to determine whether the WSIB had breached the WSIA, and because the complaint was out of time.

Ombudsman Reviews

The Ombudsman's Office has the authority to investigate complaints about the Ontario government and its agencies, including the Tribunal.

When the Ombudsman's Office receives a complaint about a Tribunal decision, the Office considers whether the decision is authorized by the legislation, whether the decision is reasonable in light of the evidence and whether the process was fair. If the Ombudsman's Office identifies issues which indicate the need for a formal investigation, the Tribunal will be notified of the Ombudsman's intent to investigate. While an Ombudsman investigation may result in a recommendation to reconsider, this is unusual. Generally, the Ombudsman concludes that there is no reason to question the Tribunal's decision.

The Tribunal typically receives a few notifications of the Ombudsman's intent to investigate each year. The Tribunal did not receive any new intent to investigate notifications in 2012, and the only outstanding intent to investigate file was closed.

TRIBUNAL REPORT

Tribunal Organization

Vice-Chairs, Members and Staff

Lists of the Vice-Chairs and Members, senior staff and Medical Counsellors who were active at the end of the reporting period, as well as a list of 2012 reappointments and newly appointed Vice-Chairs and Members, can be found in Appendix A.

Executive Offices

The Chair, the Executive Director and their small group of dedicated staff comprise the Executive Offices of the Tribunal. The Tribunal is an adjudicative agency of the Government of Ontario and a public body as defined by the *Public Service of Ontario Act, 2006*, and its employees are public servants.

The Chair is responsible for the overall strategic direction and performance of the Tribunal. The Chair provides leadership to the Tribunal to ensure that it operates in keeping with its mandate, as defined in the *Workplace Safety and Insurance Act*, and within approved governance and accountability requirements of the government.

The Chair's Office manages the recruitment, appointment and re-appointment process for Order in Council (OIC) appointees to WSIAT, and works with the Public Appointments Secretariat and the Ministry of Labour in this regard. The Office also responds to correspondence from parties and stakeholders. The Chair works closely with the Appeals Administrator, Counsel to the Chair and General Counsel on case-related matters.

The Executive Director is responsible for the administration of the Tribunal operations according to the strategic direction and approval of the Chair; managing the Tribunal's quality control processes; developing policies and procedures for effective administration and appeal processing in compliance with statutory obligations; support of the educational needs of OIC appointees; and overseeing the preparation of the Tribunal's business and Case Management plans and quarterly reports. The Executive Director co-ordinates Tribunal operations through a talented senior management team.

The Tribunal's administration is independent from the Workplace Safety and Insurance Board (WSIB) and the Ministry of Labour. In addition to the departments outlined in the following pages, the Tribunal administers its own human resources and finance functions, staff and adjudicator training and participates in a shared services agreement.

The Tribunal's Human Resources Department is led by the Associate Director of Human Resources and Labour Relations. This Department provides the entire range of labour relations and human resources functions to Tribunal managers and staff. These functions include: payroll, compensation and benefits; staffing and recruitment; performance management; health, safety and wellness; and support for the business planning cycle. In 2012, the Department also took on responsibility for overseeing staff training content following the reorganization of the Information Services Department. A training session on customer service was organized in the first half of the year for legal workers, hearing co-ordinators and support staff. The focus in the second half of the year was to develop privacy training, which will be presented to staff in early 2013. In addition to these focused efforts, the Tribunal regularly provides orientation sessions for new staff.

The Tribunal's Finance Department is led by the Manager, Finance. This group processes all Tribunal financial transactions, including payments to the part-time OIC appointees. They maintain the bank account and request monthly reimbursement of funds from WSIB. Other activities include maintenance of the Tribunal's

financial system, development of the annual budget, preparing monthly, quarterly and annual financial reports and assistance with the annual audit.

The Adjudication Support Group reports into the Executive Offices to the Executive Assistant to the Chair. This Group processes and releases all decisions prepared by Tribunal Panels and Vice-Chairs. In 2012, the Group released 2,563 final decisions, plus interim and reconsideration decisions. Early in the year, the Group was trained on accessible decision formatting.

Reporting into the Executive Offices, the OIC professional development committee is composed of the Orientation Vice-Chair, General Counsel, Counsel to the Chair, the Executive Director, the Manager of the Medical Liaison Office and the Executive Assistant to the Chair. In 2012, the committee developed and co-ordinated the presentation of three sessions for Tribunal adjudicators. Further, the Orientation Vice-Chair updated and oversaw the orientation program for new adjudicators, which is presented by Tribunal Vice-Chairs, Members and staff. OIC training is an important part of the Tribunal's annual focus; it requires and benefits from the time and efforts of many staff and adjudicators. Support for the training days and the new adjudicator orientation sessions is provided by the staff in the executive offices with the supervision of the Executive Assistant to the Chair.

As in prior years, the Tribunal provided shared services on behalf of the Ontario Labour Relations Board and the Pay Equity Hearings Tribunal pursuant to a Shared Services Agreement. These services consisted of copying, mail and hearing room set-up. In addition to these two labour agencies, the Human Rights Tribunal of Ontario participated in the agreement with respect to the administration of the Ontario Workplace Tribunals Library.

Office of the Counsel to the Chair

The Office of the Counsel to the Chair (OCC) has existed since the creation of the Tribunal in 1985. It is a small, expert legal department which is separate from the Tribunal Counsel Office (TCO) and is not involved in making submissions in hearings. Publications Counsel and the OWTL Librarians are also members of OCC.

OCC Lawyers

Draft review, which has been described in prior Annual Reports, is the responsibility of OCC lawyers. OCC lawyers also provide advice to the Chair and Chair's Office with respect to a range of matters, including accountability documents, complicated reconsideration requests, post-decision inquiries, Ombudsman inquiries, conduct matters and other complaints. Of particular note in 2012, OCC lawyers provided advice on the requirements of the *Adjudicative Tribunals Accountability, Government and Appointments Act, 2009* (ATAGAA) with respect to developing new public accountability documents and revising the Members' Code of Conduct to comply with ATAGAA.

Professional development continued to be important in 2012, given the four different legislative schemes, statutory amendments, extensive Board policy and policy amendments. OCC lawyers revised the orientation materials for new adjudicators in light of recent legal and policy developments. At the end of the year, orientation sessions on workplace safety and insurance law and policy were delivered to new Order-in-Council appointees, including three newly appointed Vice-Chairs. In addition, OCC lawyers were active in developing and delivering ongoing professional development sessions to adjudicators and staff.

OCC lawyers are also responsible for assisting the Tribunal in meeting its obligations under the *Freedom of Information and Protection of Privacy Act* (FIPPA). OCC lawyers handle FIPPA requests and appeals, and provide advice on privacy matters. Assistance is also provided with respect to records management issues

Publications Counsel

During 2012, the Tribunal released, and Publications Counsel processed, over 2,900 decisions. These form part of the over 60,000 decisions released since the Tribunal's creation in 1985. The interval between the release of a decision and its addition to the Tribunal's database continues to be approximately six weeks.

All Tribunal decisions are published and available free of charge through the Tribunal's searchable database on the Tribunal's website at wsiat.on.ca. Many of the database records contain a summary of the decision. The full text of Tribunal decisions is also available free of charge on the website of the Canadian Legal Information Institute (CanLII) and on a paid basis on the LexisNexis (Quicklaw) website.

Since 2010, the Tribunal has also identified selected noteworthy decisions on the home page of its website. This service is designed to provide information about key decisions on medical, legal and procedural issues in a timely and easily accessible manner.

Library Services

The Ontario Workplace Tribunals Library (OWTL) is an information resource centre open to members of the public. Library staff assists workers, employers and their representatives by collecting and organizing materials related to workplace health and safety, human rights/discrimination, pay equity, labour relations and employment law, administrative law and other related subjects. In addition to the Tribunal, the Library provides services to the staff of the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario and the Pay Equity Hearings Tribunal.

The Library continues to add public documents to the OWTL website to meet the increased demand for online access to our specialized collections. Workshops and training programs were delivered to adjudicators and staff at our client tribunals, covering topics such as searching WSIAT databases, Legal and Legislative Research and Web 2.0. Library staff also streamlined the process for the weekly transfer of Tribunal decisions to legal vendors such as CanLII and Quicklaw. The Information Products line was further developed with the launch of the OLRB Certificates Database providing online access to collective bargaining certificates.

At the beginning of 2012, after two years of dedicated service, Head Librarian, Peter Marques, accepted a new position at another organization. Martha Murphy, MLIS, is the new Head Librarian of OWTL. Martha has an extensive library management background, including previous positions with the Ontario Fire Marshal and IBM.

Office of the Vice-Chair Registrar

The staff of the Office of the Vice-Chair Registrar (OVCR) are the primary point of contact for appellants, respondents and representatives with an appeal or application at the Tribunal.

All initial processing of appeals is completed by the Tribunal's OVCR. On receipt of an appeal, the Tribunal gives notice to the parties. When the appellant advises they are ready to proceed to a hearing, the Tribunal requests the claim or firm files from the Board. The Tribunal then prepares the appeal for hearing, ensuring that the appeal documents are complete and that the case is ready for hearing.

The Tribunal's pre-hearing staff also utilize a variety of Alternative Dispute Resolution (ADR) techniques to resolve appeals prior to the hearing. Staff trained in communication and conflict resolution work with both represented and unrepresented parties.

The Vice-Chair Registrar

The Tribunal's Vice-Chair Registrar is Martha Keil. On referral by Tribunal staff and the parties to the appeal, the Vice-Chair Registrar may make rulings on preliminary and pre-hearing matters such as admissible evidence, jurisdiction and issue agenda. The process may be oral or written and results in a written decision with reasons. Requests to have a matter put to the Vice-Chair Registrar are raised with OVCR staff.

The Registrar's Office is divided into a number of areas.

The Early Review Department

The Early Review Department is responsible for the initial processing of all Tribunal appeals. Staff review all Notices and Confirmations of Appeals to ensure that they are complete and meet legislative requirements. They also identify appeals that can be heard by way of an expedited written process.

Early Review staff review appeals to determine whether there are any jurisdictional or evidentiary issues that would prevent the Tribunal from deciding an appeal. On occasion, appeals may be withdrawn by the appellant and the parties pursue other alternatives.

Vice-Chair Registrar Teams

All files are assigned to pre-hearing staff for substantive review to ensure that they are ready for hearing. This step is instrumental in reducing the number of cases that are adjourned or require post-hearing investigations due to an incomplete issue agenda, outstanding issues at the Board or incomplete evidence. Staff respond to party correspondence and queries and to Vice-Chair or Panel instructions up to the hearing date.

Mediation Services

Mediation services are offered to parties to resolve appeals without proceeding to a formal hearing. If an appellant requests mediation, the Tribunal reviews the appeal to determine whether it is suitable for mediation and contacts the responding party to determine if the respondent is willing to explore a mediated resolution. If the appeal is not suitable for mediation (e.g. credibility is an issue, or a respondent does not want to participate), the appeal is re-streamed and prepared for a hearing.

Where both parties are amenable and the appeal is suitable for mediation, the appeal is assigned to a mediator for substantive review. The mediator may contact the parties in advance of the mediation date to discuss options for resolving the appeal, to clarify issues or to identify outstanding information. At the mediation, the mediator works with the parties in a neutral and confidential setting to arrive at a jointly acceptable resolution to an appeal. Mediations are typically conducted as face-to-face meetings but teleconferences are used where appropriate.

If the mediation results in the parties reaching a resolution, an agreement is formalized in writing and submitted to the parties for their signatures. The executed agreement is then submitted to a Vice-Chair for review. If the Vice-Chair is satisfied that the resolution is consistent with law, Board policy and is reasonable based on the facts of the case, the Vice-Chair will issue a written decision incorporating the terms of the agreement. Where an appeal is not resolved through mediation efforts, it is prepared for hearing.

Single Party Appeals

If the appellant has indicated an interest in mediation, but the respondent is not participating in the appeal, the appeal may be referred to a Tribunal mediator to determine whether an early resolution is possible. Discussions with the appellant's representative may result in a resolution of the appeal at this stage.

On occasion, a group of single party appeals involving the same representative may be referred to a Tribunal mediator. This is done where it is believed that discussion may result in some appeals being resolved quickly, or where recommendations or early decisions by the Vice-Chair Registrar appear to be possible.

Appeal Support Services

Appeal Support Services also reports to the Director, Appeal Services. This department maintains the Tribunal's appeal files and receives and processes all facsimiles, documents, claim files and firm files. Further, this group provides printing, mail and hearing room set-up services for other agencies under the Shared Services Agreement.

Tribunal Counsel Office

The Tribunal Counsel Office (TCO) is a centre of legal and medical expertise at the Tribunal. In addition to administrative support staff, TCO consists of three sections which work closely together, each reporting to the General Counsel: the TCO lawyers, the TCO legal workers and the Medical Liaison Office.

Hearing Work

Under the Tribunal's case processing model, TCO oversees appeals which raise the most complex medical, legal or policy issues. These appeals are streamed to TCO from the Early Review Department, or are assigned to TCO for post-hearing work at the direction of a Panel or Vice-Chair. TCO also handles applications for reconsideration of Tribunal decisions.

Pre-hearing Work

When a complex appeal is received by TCO prior to a hearing, the case is assigned to a lawyer. The case is carried by that lawyer until the final decision is released. The lawyer resolves legal, policy and evidentiary issues that arise prior to the hearing, provides assistance to the parties if there are procedural questions concerning the appeal, and attends at the hearing to question witnesses and make submissions on points of law, policy, procedure and evidence.

Post-hearing Work

After a hearing, a Tribunal Vice-Chair or Panel may conclude that additional information or submissions are required before a decision can be made. In those circumstances, the Vice-Chair or Panel sends a written request for assistance to the Post-hearing Manager in Tribunal Counsel Office. The request is then assigned to a TCO legal worker or lawyer, depending on the complexity of the matters involved. The legal worker or lawyer carries out the directions of the Panel or Vice-Chair, and co-ordinates any necessary input from the parties to the appeal.

Typical post-hearing directions would include instructions to obtain important evidence (usually medical) found to be missing at the appeal, to request a report from a Tribunal medical assessor, or to arrange for written submissions from the parties and TCO lawyers.

TCO Lawyers

TCO has a small group of lawyers with considerable expertise in workplace safety and insurance law, and administrative law. As noted above, lawyers in TCO handle the most complex appeals involving legal and medical issues. TCO lawyers also provide technical case-related advice to legal workers in TCO and the Office of the Vice-Chair Registrar.

Examples of appeals handled by TCO lawyers include complex occupational disease appeals, employer assessment appeals, appeals involving difficult procedural issues, and appeals which raise constitutional and *Charter of Rights and Freedoms* issues. A bilingual TCO lawyer is available to assist with French language appeals.

A large component of TCO lawyer work involves providing non-appeal related advice to other departments of the Tribunal. Matters such as negotiating contracts, security, human resource issues, training, and liaison with organizations outside the Tribunal all require input from TCO lawyers.

General Counsel and TCO lawyers represent the Tribunal on applications for judicial review of Tribunal decisions, and on other Tribunal related court matters.

TCO Legal Workers

TCO legal workers handle exclusively post-hearing appeal work and reconsiderations. They are a small, highly trained group which works diligently to ensure the directions of Panels and Vice-Chair are completed quickly, thoroughly and efficiently. The TCO Post-hearing Manager directs and assigns work to the TCO legal workers. The Post-hearing Manager also reviews and analyzes the types of post-hearing requests, the reasons for adjournments of hearings, and monitors the progression of the post-hearing and reconsideration caseload.

Emergency Management and Security

Security at the Tribunal is a priority. The Tribunal is committed to providing a safe and accessible environment for staff, adjudicators and parties.

In 2012, the Tribunal's General Counsel became the Chair of WSIAT's Emergency Management and Security (EMS) Committee. The EMS Committee meets regularly to review security concerns, to develop and revise security policies and to make recommendations to ensure the safety of everyone at the Tribunal.

The Chair of the EMS Committee is supported by an EMS Deputy Lead, who is responsible for reporting to the EMS Committee on incidents involving workplace violence and security. The EMS Deputy Lead

co-ordinates emergency evacuations and drills and emergency response personnel. The Deputy Lead also co-ordinates Tribunal emergency and security policies, security systems, and procedures and training for EMS personnel.

Medical Liaison Office

The Tribunal must frequently decide appeals that raise complex medical issues or require further medical investigation. The Tribunal thus has an interest in ensuring that Panels and Vice-Chairs have sufficient medical evidence on which to base their decisions. The Medical Liaison Office (MLO) plays a major role in

identifying and investigating medical issues, and obtaining medical evidence and information to assist the decision-making process.

To carry out its mandate, MLO seeks out impartial and independent expert medical expertise and resources. The Tribunal's relationship with the medical community is viewed as particularly important since, ultimately, the quality of the Tribunal's decisions on medical issues will be dependent on that relationship. MLO co-ordinates and oversees all the Tribunal's interactions with the medical community. MLO's success in maintaining a positive relationship with the medical community is demonstrated by the Tribunal's continuing ability to readily enlist leading members of the medical profession to provide advice and assistance.

MLO Staff

Jennifer Iaboni, RN, is the Manager of MLO. Jennifer has an outstanding clinical nursing background, having worked in surgical nursing at Toronto Western Hospital, Centenary Health Centre and York Central Hospital. In addition to 11 years experience in critical care, Jennifer gained valuable experience while working as a Nurse Case Manager at the WSIB.

In addition, Shelley Quinlan is the MLO Officer and has a baccalaureate in nursing from Ryerson University. She worked in critical care nursing for a number of years, and then at WSIB, first as a nurse case manager and then a NEL clinical specialist.

Medical Counsellors

The Medical Counsellors are a group of eminent medical specialists who serve as consultants to WSIAT. They play a critical role in assisting MLO to carry out its mandate of ensuring the overall medical quality of Tribunal decision-making. The Chair of the Medical Counsellors is Dr. John Duff. A list of the current Medical Counsellors is provided in Appendix A.

Prior to a hearing, MLO identifies those appeals where the medical issues are particularly complex or novel. Once the issues are identified, MLO may refer the appeal materials to a Medical Counsellor. The Medical Counsellor reviews the materials to verify whether the medical evidence is complete and that the record contains opinions from appropriate experts. The Counsellor also ensures that questions or concerns about the medical issues that may need clarification for the Panel or Vice-Chair are identified. Medical Counsellors may recommend that a Panel or Vice-Chair consider obtaining a Medical Assessor's opinion if the diagnosis of the worker's condition is unclear, if there is a complex medical problem that requires explanation or if there is an obvious difference of opinion between qualified experts.

At the post-hearing stage, Panels or Vice-Chairs may need further medical information to decide an appeal. These adjudicators may request the assistance of MLO in preparing specific questions for Medical Assessors. Medical Counsellors assist MLO by providing questions for the approval of the Panels or Vice-Chairs, and by recommending the most suitable Medical Assessor.

Medical Assessors

As the Courts have recognized, the Tribunal has the discretion to initiate medical investigations, including consulting medical experts, in order to determine any medical question on an appeal (*Roach v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2005] O.J. No. 1295 (ONCA)). These medical experts are known as the Tribunal's "Assessors."

Only the most outstanding medical experts are retained as Assessors. Most Assessors are members of a College as defined in the *Regulated Health Professions Act, 1991*. All Assessors must be impartial. They

cannot be employees of the WSIB, and neither the Assessors nor their business partners can have treated the worker or a member of the worker's family or acted as a consultant for the worker's employer.

Medical Assessors may be asked to assist the Tribunal in a number of ways. Most often, they are asked to give their opinion on some specific medical question, which may involve examining a worker and/or studying the medical reports on file. They may be asked for an opinion on the validity of a particular theory which a Hearing Panel or Vice-Chair has been asked to accept. They may be asked to comment on the nature, quality or relevancy of medical literature. Medical Assessors also assist in educating Tribunal staff and adjudicators in a general way about a medical issue or procedure coming within their area of expertise.

The opinion of a Medical Assessor is normally sought in the form of a written report. A copy of the report is made available to the worker, employer, the Panel or Vice-Chair, and (after the appeal) the Board. On occasion, a Hearing Panel or Vice-Chair will want the opportunity to question the Medical Assessor at the hearing to clarify the Assessor's opinion. In those cases, the Medical Assessor will be asked to appear at the hearing and give oral evidence. The parties participating in the appeal, as well as the Panel or Vice-Chair, have the opportunity to question and discuss the opinion of the Medical Assessor.

Although the report of a Medical Assessor will be considered by the Tribunal Panel or Vice-Chair, the Courts have recognized that the Medical Assessor does not make the decision on appeal (*Hary v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2010] O.J. No. 5384 (Div. Ct.)). The actual decision to allow or deny an appeal is the sole preserve of the Tribunal Panel or Vice-Chair.

The Appointment Process for Medical Assessors

The Medical Counsellors identify highly qualified medical professionals eligible to be Tribunal Assessors. Those medical professionals who agree to be nominated as candidates have their qualifications circulated to all the Medical Counsellors, and to members of the WSIAT Advisory Group. The Tribunal has the benefit of the views of the Medical Counsellors and the Advisory Group when it determines the selection for Assessors. Assessors who are a member of a College may be named to a list of Assessors for a three-year term, and may be renewed. Assessors who are not a member of a College may also be named to a separate list of Assessors.

MLO Resources Available to the Public

MLO places medical articles, medical discussion papers, and anonymized medical reports on generic medical or scientific issues in the Ontario Workplace Tribunals Library. This publicly-accessible collection of medical information specific to issues that arise in the workers' compensation field is unique within the Ontario Workplace Safety and Insurance system. New medical information is announced as it becomes available through the WSIAT publication *WSIAT In Focus*. This publication is available to the public on the WSIAT website.

Of all the medical information made available by MLO, WSIAT Medical Discussion Papers are the most frequently requested. The Tribunal commissions Medical Discussion Papers to provide general information on medical issues which may be raised in Tribunal appeals. Each Medical Discussion Paper is written by a recognized expert in the field selected by the Tribunal, and each expert is asked to present a balanced view of the current medical knowledge on the topic.

Medical Discussion Papers are intended to provide a broad and general overview of a topic, and are written to be understood by lay individuals. Medical Discussion Papers are not peer reviewed and do not necessarily represent the views of the Tribunal. A Vice-Chair or Panel may consider and rely on the medical information provided in the discussion paper, but the Tribunal is not bound by a Medical Discussion Paper in any

particular case. It is always open to parties to an appeal to rely on or distinguish a Medical Discussion Paper, or to challenge it with alternative evidence.

Medical Discussion Papers are available to the public through the WSIAT website.

TCO Support Staff

TCO and MLO share a small group of dedicated support staff. Working under the direction of the Supervisor of Administrative Services, TCO support staff assist the lawyers, nurses and legal workers with case-tracking input, file management, preparation and filing of court documents, and general support duties.

Scheduling Department

The Tribunal's Scheduling Department is led by the Appeals Administrator. Once an appeal is hearing ready, the Department receives a request to schedule a hearing date from the Tribunal Counsel Office or the Office of the Vice-Chair Registrar. The Department co-ordinates the hearing schedule for all appeals, oral and written, heard by the Tribunal. The Tribunal conducts hearings in Hamilton, Kitchener, London, Oshawa, Ottawa, Sault Ste. Marie, Sudbury, Thunder Bay, Timmins, Toronto and Windsor. The Department uses a longstanding scheduling model that allows for consultation with parties in the setting of hearing dates. As well, the Department arranges for interpreters, regional boardrooms, service of summonses and the scheduling of pre-hearing conferences, and determines the amount of time designated for a hearing and the hearing location. Pre-hearing adjournment requests are decided by the Appeals Administrator.

Case Management and Systems

The Case Management and Systems Department (CMS) provides information services and supports the Tribunal's information technology (IT) infrastructure. The Department's mandate is to design, develop and implement information management, information technology and workflow solutions to support Tribunal administration and to promote effective caseload management and knowledge sharing.

The Department operates services in six program areas:

- developing, acquiring and supporting information and information technology resources;
- developing and implementing policies pertaining to information systems and information technology;
- supporting computer users and delivering training to ensure that technologies are well understood and well utilized;
- developing and implementing procedures to protect, organize and maintain the Tribunal's information and information technology systems;
- planning and evaluating caseload production and providing individual and unit feedback regarding productivity; and,
- implementing procedures and processes to ensure that information is appropriately accessible and managed in accordance with principles and laws governing collection, use, disclosure, retention and destruction.

Technology Procurements and Upgrades

In 2012, the main technology upgrade was to the computer server and data storage systems. In July, the Department completed the tendering process. The new equipment was configured in August and September, and the switch over from the old environment to the new occurred on October 13.

Also in 2012, the Tribunal tendered for and obtained new printing equipment. Thirty-two new workgroup printers were installed as replacements for earlier models and one of the four large production copiers was installed in place of an earlier model. Other equipment acquisitions in 2012 included new scanners (one high volume and two flatbed) and new digital recorders (two sets).

New software innovations were introduced in 2012. Ten new modules were created for the Tribunal's custom-built applications and three new statistical reports were developed.

Other technology upgrades included modifications to the customized SharePoint portals and to the staff entry and exit profile management systems. There were also regular updates to the software and operating systems both at the server and workstation levels.

Policy Development and Implementation

In 2012, the Tribunal implemented revisions to the IT Usage Policy and the Recorded Information Management Policy. As well, the Tribunal introduced two new information management guidelines (Privacy Breach Guidelines and Fax Security Guidelines). These policies and guidelines were implemented by the Tribunal's Information Management Subcommittee, acting under the direction of the Tribunal's Senior Management team.

User Support and Technology Training

Addressing the technical aspects of its mandate, the Department kept the servers and peripherals running near-continuously throughout the year. The technicians kept the servers and network environment current with respect to all software updates. The Department's regular hours of business were supplemented by five pre-scheduled weekend shut-downs when software patches and updates were applied. Case Management and Systems staff made IT resources and services available to new OICs and employees, revoked access privileges of departing employees, created and managed permissions profiles for applications and shared folders, and managed the Tribunal's information backup protocols. The staff also updated the Computer System Support Guide for Tribunal adjudicators, and conducted new user orientation and topical seminars for adjudicators and for staff throughout the course of the year. They partnered with private firms (service providers) to ensure that internet sites were effectively hosted, incoming email was effectively routed and filtered, and that the Tribunal's computer room protection equipment was continually monitored and serviced at the regular quarterly and annual service intervals.

To assist in the management of the user support portfolio, the Department maintains a comprehensive IT Help Request service. This service is accessed electronically by staff and by OICs from any computer workstation at the Tribunal and from any remote connection. In 2012, through this service, the Department handled 4,705 requests. The distribution of types of support services was similar to the distribution in previous years. The greatest number of support requests (3,580 or 76%) was for software application support. This was followed by requests for equipment servicing (438, or 9%), user setup and authentication services

(303, or 7%), and connection assistance (272, or 6%). Equipment booking and topical training requests accounted for the remainder (112, or 2%).

French Language Translation Services

The Tribunal met the obligations of the *French Language Services Act* by ensuring that information for the public (including printed materials and on-line media) was accessible to clients in both official languages.

Information Management and Privacy

The Tribunal continued to work with the Archives of Ontario to schedule its records and to implement its signed schedules. As well, staff co-ordinated the Tribunal's privacy program by answering questions from Tribunal staff on privacy matters. More complex privacy matters are referred to counsel in the Office of the Counsel to the Chair.

Production and Systems Infrastructure Planning

In the fourth quarter, the Department produced its caseload movement plan for 2013. Included in this plan is a forecast for incoming new appeals and corresponding targets for individual and team performance as necessary to ensure effective caseload management throughout the course of the year.

Also in the fourth quarter, the Department prepared its annual five-year IT infrastructure plan. This plan includes budgeting and cost estimates for IT equipment and services.

Caseload and Production Reporting

In 2012, the Department provided regular feedback to individuals, teams and to the senior management team regarding caseload intake, caseload movement and productivity. As in previous years, the Department's statistician compiled, distributed and posted these reports according to weekly, monthly and quarterly schedules.

Caseload Processing

Introduction

The Workplace Safety and Insurance Appeals Tribunal is the final level of appeal to which workers and employers may bring disputes concerning workplace safety and insurance matters in Ontario. At the Tribunal, appeals proceed through a two-part application process. To start an appeal and meet the time limits in the legislation, an appellant files a Notice of Appeal form (NOA). Appeals remain at this "notice" stage while preliminary information is gathered and until the appellant indicates readiness to proceed toward an appeal hearing. The appellant indicates readiness by filing the Confirmation of Appeal form (COA). Once the COA is received at the Tribunal, the appeal enters the second, or "resolution" processing stage.

Caseload

At the end of Year 2012, there were 5,597 active cases within these two process stages. Chart 1 shows the distribution in more detail.

Active Inventory

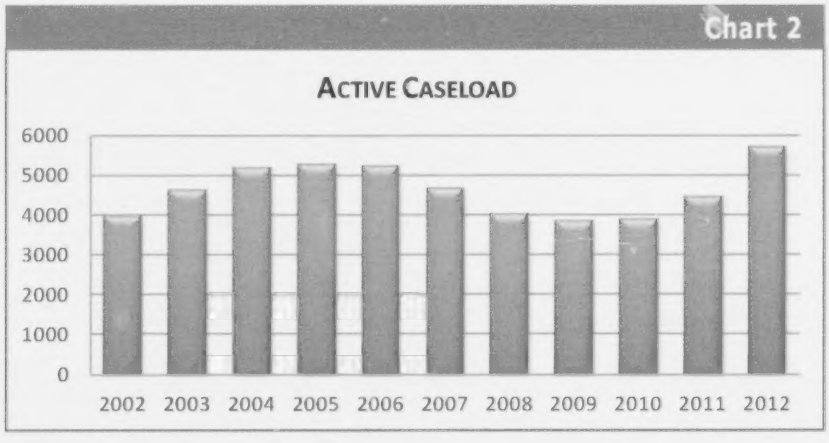
The level of the Tribunal's active inventory is affected by three factors: the number of incoming appeals in a year, the number of appeals that are confirmed as ready to proceed in that year, and the number of hearings and other appeal dispositions that are achieved in the year. In 2012, these factors combined to produce a 26.1% overall increase in the active inventory as compared to the 2011 year-end figure. Chart 2 shows the active inventory in comparison to previous years.

Chart 1

INVENTORY OF ACTIVE CASES ON DECEMBER 31, 2012

Notice Process	
Cases active in Notice stage processing	1948
	1948
Resolution Process	
Early Review stage	41
Substantive Review	691
Hearing Ready	67
Scheduling and Post-hearing	2319
WSIAT Decision Writing	531
	3649
Total Active Cases	**5597**

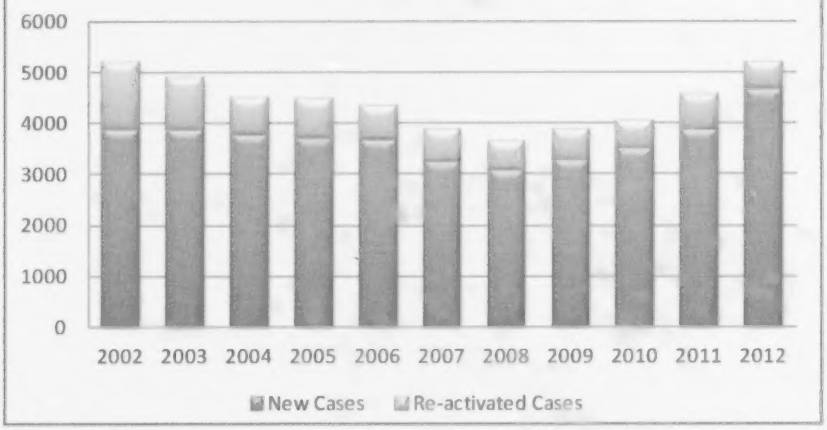
Chart 2



Incoming Appeals

Chart 3

INCOMING APPEALS



The incoming caseload trend is shown in Chart 3. In 2012, the Tribunal's overall intake from new appeals and reactivations totaled 5,197, and this represented a total increase of 13.7% as compared with the 2011 intake total. "Reactivations" are appeals in which the appellant has indicated a readiness to proceed with an appeal following an inactive period during which the appellant may have acquired new medical evidence, received another final decision from the Board or sought new representation. New appeals to the Tribunal are appeals of final decisions at the Board's Appeals Branch.

Chart 4

CASES DISPOSED OF IN 2012

Pre-hearing Dispositions	
Without Tribunal Final Decisions	
Made Inactive	525
Withdrawn	731
With Tribunal Final Decisions (declared Abandoned)	58
	1314
Hearing Dispositions	
Without Tribunal Final Decisions	
Made Inactive	84
Withdrawn	8
With Tribunal Final Decisions	2505
	2597
TOTAL (Pre-hearing and Hearing)	
Without Tribunal Final Decisions	1348
With Tribunal Final Decisions	2563
	3911

NOTE: This chart excludes post-decision figures. The post-decision components of the workload (Reconsideration requests, Ombudsman investigations and Applications for judicial review) are summarized in Charts 13, 14 and 15.

Case Resolutions

The Tribunal achieves case resolutions (also known as case dispositions) in a number of different ways. The most frequent source of case resolution is through a written Tribunal decision following an oral or written hearing process. The WSIA requires written reasons. Also, the Board requires written reasons to implement a decision. Other methods of dispute resolution, used primarily in the pre-hearing areas, are: telephone discussions regarding issue agendas and evidence; file reviews for jurisdiction issues or compliance with time limits; and, where two parties are participating, staff mediation.

As shown in Chart 4, the Tribunal disposed of 3,911cases in 2012. This included 1,314 "Pre-hearing" and 2,597 "Hearing" dispositions.

Timeliness of Appeal Processing

Chart 5 illustrates performance in terms of time frame for completing cases. The time frame begins when the appellant confirms readiness to proceed to a hearing and ends when the case is disposed. In 2012, the percent of cases resolved within nine months was lower than it was in 2011. (In 2012, 46% of cases were resolved within nine months, compared to 57% in 2011.)

The Tribunal also measures the median interval of the first offered hearing date. This interval is measured from the date on which cases are confirmed ready to proceed to the future hearing date first offered to the parties. Chart 6 shows that the typical length of time for this stage in the appeals process was longer than it was in year 2011 (7.9 months in 2012, compared to 6.2 months in 2011).

An additional performance target for the Tribunal is to release final decisions within 120 days of completing the hearing process. As shown in Chart 7, in 2012, this target was achieved 86% of the time.

Chart 5

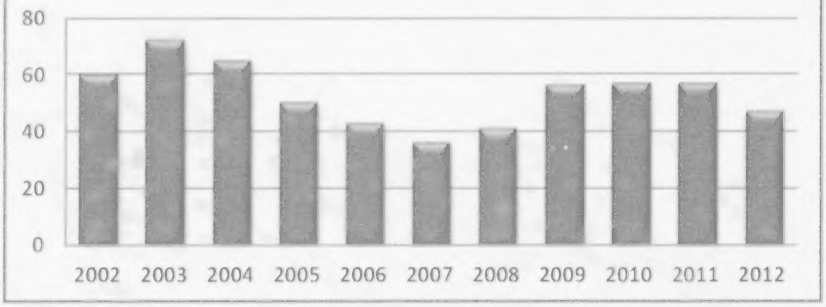


Chart 6

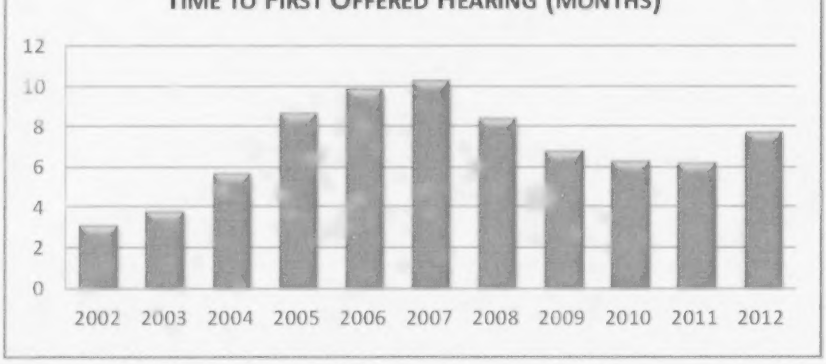
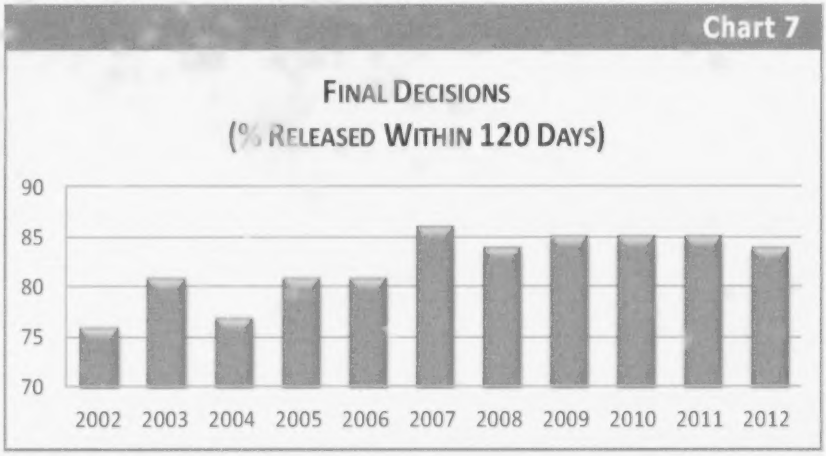


Chart 7



Hearing and Decision Activity

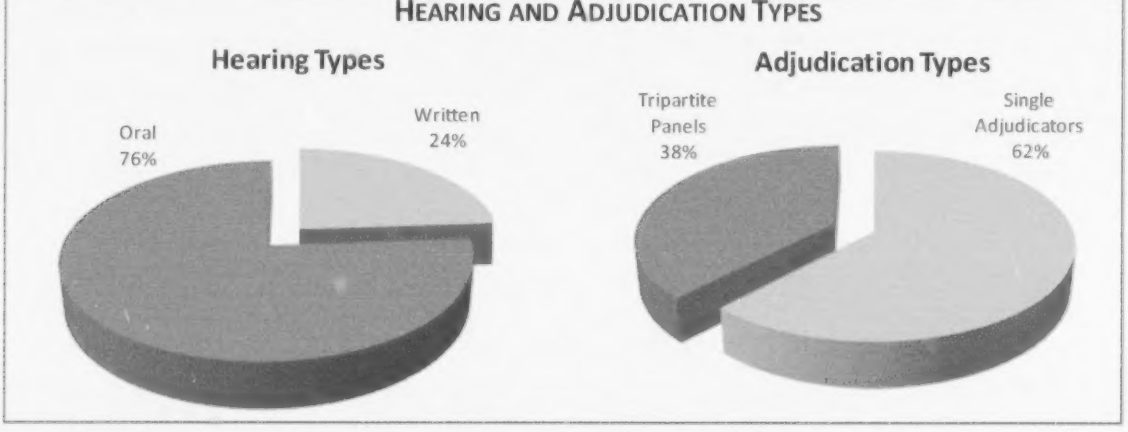
Chart 8

Chart 8 depicts the Tribunal's Hearing and Decision production. In 2012, the Tribunal conducted 2,742 hearings and issued 2,723 decisions. The Tribunal strives to achieve decision-readiness following completion of the first hearing. Some cases require post-hearing work following the first hearing, and some hearings are adjourned requiring a subsequent hearing before the same or a different Vice-Chair or Panel. Most cases require only a single hearing.

Hearing Type

In 2012, the percentage breakdown of hearing types was as follows: oral hearings continued to be the most common hearing type at 75%, followed by written hearings at 25%. The percentage of single adjudicator hearings increased in 2012 to 62% (from 60% in 2011); tripartite panels decreased to 38% of cases heard. Chart 9 presents these hearing characteristics.

Chart 9



Representation at Hearing

Tribunal statistics show that for injured workers, 36% were represented by paralegals; 21% by lawyers and legal aid; 15% by the Office of the Worker Adviser; and, 12% by union representatives. The remaining 16% is allocated among various non-categorized representation, for instance, family friend, family member or MPP

office. Employers were represented before the Tribunal as follows: 47% were represented by paralegals; 32% were represented by lawyers; 7% by the Office of the Employer Adviser; and, 2% by firm personnel. The remaining 12% are non-categorized. These statistics are presented in Chart 10.

Chart 10

HEARING REPRESENTATION

Worker Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded	14%	None Recorded*	64%
Subtotal	**14%**	**Subtotal**	**64%**
Lawyer/Legal	21%	Lawyer	11%
OWA	15%	OWA	5%
Others	2%	Others	3%
Paralegal	36%	Paralegal	11%
Union	12%	Union	7%
Subtotal	**86%**	**Subtotal**	**36%**

Employer Representation

A) In Worker Appeals		B) In Employer Appeals	
None Recorded*	72%	None Recorded	11%
Subtotal	**72%**	**Subtotal**	**11%**
Firm personnel	10%	Firm personnel	2%
Lawyer	9%	Lawyer	32%
OEA	3%	OEA	7%
Others	1%	Others	1%
Paralegal	5%	Paralegal	47%
Subtotal	**28%**	**Subtotal**	**89%**

* Note: In employer appeals, workers and their representatives are often not present because in many of these cases the issues do not concern the worker. Similarly, there are many worker appeals where employers and their representatives do not attend.

Caseload by General Appeal Issue Type

The appeal type categorization of incoming cases and dispositions has been consistent over the years and 2012 was no exception. In 2012, Entitlement-related cases constituted the majority of cases (96%). Special Section cases (Right to Sue and Access) comprised typically small portions (4%). Charts 11 and 12 provide historical comparisons of incoming cases and cases disposed in 2012.

Chart 11

BREAKDOWN OF INCOMING CASES BY APPEAL TYPE FOR THE YEARS 2008 - 2012

	2008		2009		2010		2011		2012	
Type	No.	%	No.	%	No.	%	No.	%	No.	%
Leave	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Right to Sue	61	1.7%	67	1.7%	65	1.6%	63	1.4%	60	1.2%
Medical Exam	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	0.0%
Access	137	3.8%	185	4.7%	197	4.8%	108	2.4%	108	2.1%
Total Special Section	198	5.4%	252	6.5%	262	6.4%	171	3.7%	169	3.3%
Preliminary (not yet specified)	3	0.1%	5	0.1%	0	0.0%	1	0.0%	2	0.0%
Pension	5	0.1%	3	0.1%	1	0.0%	2	0.0%	0	0.0%
N.E.L./F.E.L. *	37	1.0%	21	0.5%	11	0.3%	5	0.1%	4	0.1%
Commutation	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Employer Assessment	146	4.0%	106	2.7%	165	4.1%	340	7.4%	401	7.7%
Entitlement	3055	83.7%	3331	85.4%	3465	85.3%	3889	85.1%	4474	86.1%
Ext post WSIB dec. deadline	163	4.5%	143	3.7%	137	3.4%	154	3.4%	139	2.7%
Jurisdiction Time Limit	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	6	0.2%	6	0.2%	2	0.0%	1	0.0%	0	0.0%
Classification	35	1.0%	20	0.5%	11	0.3%	2	0.0%	2	0.0%
Interest NEER	0	0.0%	1	0.0%	0	0.0%	0	0.0%	1	0.0%
Total Entitlement-related	3451	94.5%	3636	93.2%	3793	93.4%	4394	96.1%	5023	96.7%
Jurisdiction	2	0.1%	12	0.3%	8	0.2%	6	0.1%	5	0.1%
	3651		3900		4063		4571		5197	

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15.

* The NEL/FEL category represents appeals related to the non-economic and future economic loss pension criteria introduced by Bill 162.

** The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

Chart 12

Breakdown of Case Dispositions by Appeal Type for the years 2008 - 2012

	2008		2009		2010		2011		2012	
Type	No.	%	No.	%	No.	%	No.	%	No.	%
Leave	0	0.0%	0	0.0%	1	0.0%	0	0.0%	0	0.0%
Right to Sue	45	1.0%	60	1.5%	73	1.9%	62	1.6%	54	1.4%
Medical Exam	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	0.0%
Access	178	4.0%	189	4.6%	182	4.7%	117	3.1%	99	2.5%
Total Special Section	233	5.0%	249	6.1%	256	6.5%	179	4.7%	154	3.9%
Preliminary (not yet specified)	5	0.1%	2	0.0%	0	0.0%	0	0.0%	0	0.0%
Pension	5	0.1%	10	0.2%	4	0.1%	4	0.1%	1	0.0%
N.E.L./F.E.L. *	49	1.1%	46	1.1%	35	0.9%	11	0.3%	5	0.1%
Commutation	1	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Employer Assessment	170	3.8%	121	3.0%	131	3.4%	198	5.2%	285	7.3%
Entitlement	3705	83.5%	3437	84.2%	3287	84.1%	3225	84.2%	3309	84.6%
Ext post WSIB dec. deadline	225	5.1%	166	4.1%	153	3.9%	186	4.9%	147	3.8%
Jurisdiction Time Limit	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Reinstatement	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Vocational Rehabilitation **	4	0.1%	4	0.1%	13	0.3%	3	0.1%	0	0.0%
Classification	50	1.1%	37	0.9%	21	0.5%	18	0.5%	4	0.1%
Interest NEER	0	0.0%	0	0.0%	1	0.0%	0	0.0%	1	0.0%
Total Entitlement-related	4214	94.9%	3823	93.6%	3645	93.2%	3645	95.2%	3752	95.9%
Jurisdiction	2	0.0%	12	0.3%	8	0.2%	6	0.2%	5	0.1%
	4439		4084		3909		3830		3911	

NOTES: This chart excludes post-decision figures. The post-decision components of workload (requests for Reconsiderations, Ombudsman investigations and Judicial reviews) are summarized in Charts 13, 14 and 15.

* The NEL/FEL category represents appeals related to the non-economic and future economic loss pension criteria introduced by Bill 162.

** The Vocational Rehabilitation category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

Dormant and Inactive Cases

The Tribunal's overall caseload includes some that are not active. This includes cases at the preliminary "notification" (or Notice of Appeal) stage, specifically those cases which have not been moved into resolution processing because the appellants have not completed the necessary filing requirements. These cases are referred to as "dormant at the notice of appeal stage." Cases that are dormant will be moved again into active processing when appellants resume active participation. When this does not occur within the overall maximum time frame for the notice stage, the Tribunal will close the case (typically by means of an abandonment decision).

The second category of "not active" cases is used to describe appeals that were made "inactive" after the notice process had been completed (i.e., after the cases had been "confirmed" ready to proceed and after they had been moved into the Tribunal's resolution processing stage). Cases are placed in this inactive category by request of the appellant or by a Tribunal Vice-Chair. The most common reasons for placing a file in the inactive category are to allow an appellant to pursue additional medical reports, obtain a representative, or/and obtain a final ruling from the Workplace Safety and Insurance Board pertaining to an issue raised at the Tribunal hearing.

In 2012, the number of "dormant" cases increased to 1,595 from 1,477 at the end of 2011, and the number of "inactive" cases decreased to 2,522 from 2,705. Taken as a whole, this meant that the number of not active cases decreased by 1.6% in 2012.

Post-decision Workload

The post-decision workload is derived from three sources: Ombudsman follow-ups (Chart 13), Reconsideration requests (Chart 14) and Judicial Reviews (Chart 15). The post-decision workload is predominantly driven by Reconsideration requests. In year 2012, 196 Reconsideration requests were received.

Chart 13

OMBUDSMAN COMPLAINTS, ACTIVITY AND INVENTORY SUMMARY

New Complaint Notifications Received	0
Complaints Resolved	1
Complaints Remaining	0

Chart 14

RECONSIDERATION REQUESTS, ACTIVITY AND INVENTORY SUMMARY

Inquiries (Pre-reconsideration) Remaining	59
Reconsideration Requests Received	196
Reconsideration Requests Resolved	210
Reconsiderations Remaining	85

Chart 15

Judicial Reviews, Activity and Inventory Summary

Judicial Reviews at January 1st	12
Judicial Reviews Received	7
Judicial Reviews Resolved	4
Judicial Reviews Remaining	15

Financial Matters

A Statement of Expenditures and Variances for the year ended December 31, 2012 (Chart 16) is included in this report.

The accounting firm of Deloitte LLP has completed a financial audit on the Tribunal's financial statements for the year ended December 31, 2012. The Independent Auditor's Report is included as Appendix B.

Chart 16

STATEMENT OF EXPENDITURES AND VARIANCES
YEAR ENDED DECEMBER 31, 2012 (IN $000S)

	2012 BUDGET	2012 ACTUAL	2012 VARIANCE $	2012 VARIANCE %
OPERATING EXPENSES				
Salaries & Wages	11,107	11,109	(2)	(0.0)
Employee Benefits	2,194	2,218	(24)	(1.1)
Transportation & Communication	1,043	885	158	15.1
Services	7,034	6,485	549	7.8
Supplies & Equipment	344	400	(56)	(16.3)
TOTAL - W.S.I.A.T.	21,722	21,097	625	2.9
Services - W.S.I.B.	500	550	(50)	(10.0)
Interest Revenue	(10)	(9)	(1)	10.0
TOTAL OPERATING EXPENSES	**22,212**	**21,638**	**574**	**2.6**
ONE TIME EXPENSES				
Severance Payments	100	39	61	61.0
Active Caseload Reduction Strategy	200	-	200	100.0
TOTAL EXPENDITURES	**22,512**	**21,677**	**835**	**3.7**

Note: The above 2012 actuals are presented on the same basis as the approved budget and differ from the year-end audited Financial Statements presentation (see note 2 to the Financial Statements). The difference of $249 is comprised of:

Capital Fund		
Amortization	90	
Fixed assets acquired	(39)	51
Operating Fund		
Accrued severance & vacation benefits	196	
Prepaid expenses	2	198
		$ 249

Appendix A

Vice-Chairs and Members in 2012

This is a list of Vice-Chairs and Members whose Order-in-Council appointments were active at the end of the reporting period.

Full-time	Initial appointment
Chair	
Strachan, Ian J.	July 2, 1997
Vice-Chairs	
Baker, Andrew	June 28, 2006
Crystal, Melvin	May 3, 2000
Kalvin, Bernard	October 20, 2004
Keil, Martha	February 16, 1994
Martel, Sophie	October 6, 1999
McClellan, Ross	September 4, 2002
McCutcheon, Rosemarie	October 6, 1999
Noble, Julia	October 20, 2004
Patterson, Angus	June 13, 2007
Ryan, Sean	October 6, 1999
Smith, Eleanor	January 7, 2000
Members representative of employers	
Christie, Mary	May 2, 2001
Wheeler, Brian	April 19, 2000
Members representative of workers	
Grande, Angela	January 7, 2000
Hoskin, Kelly	June 13, 2007

Part-time	Initial appointment
Vice-Chairs	
Alexander, Bruce	May 3, 2000
Butler, Michael	May 6, 1999
Clement, Shirley	September 1, 2005
Cooper, Keith	December 16, 2009
Darvish, Sherry	August 12, 2009
Dee, Garth	June 17, 2009
Dempsey, Colleen L.	November 10, 2005
Dhaliwal, Paul	May 27, 2009
Doherty, Barbara	June 22, 2006
Falcone Johnstone, Mena	October 17, 2012
Faubert, Marsha	December 10, 1987
Ferdinand, Urich	April 29, 1999

Part-time	Initial appointment
Vice Chairs (continued)	
Gale, Robert	October 20, 2004
Goldberg, Bonnie	May 27, 2009
Goldman, Jeanette	June 22, 2006
Hartman, Ruth	October 6, 1999
Hodis, Sonja	July 15, 2009
Josefo, Jay	January 13, 1999
Kelly, Kathleen	June 17, 2009
Lang, John B.	July 15, 2005
MacAdam, Colin	May 4, 2005
Marafioti, Victor	March 11, 1987
McKenzie, Mary E.	June 22, 2006
Mitchinson, Tom	November 10, 2005
Moore, John	July 16, 1986
Morris, Anne	June 22, 2006
Mullan, David	July 5, 2004
Nairn, Rob	April 29, 1999
Netten, Shirley	June 13, 2007
Parmar, Jasbir	November 10, 2005
Petrykowski, Luke	October 2, 2012
Peckover, Susan	October 20, 2004
Shime, Sandra	July 15, 2009
Smith, Marilyn	February 18, 2004
Sutherland, Sara	September 6, 1991
Sutton, Wendy	May 27, 2009
Welton, Ian	June 22, 2006
Members representative of employers	
Blogg, John	November 14, 2012
Davis, Bill	May 27, 2009
Lust, Arthur	April 16, 2008
Phillips, Victor	November 15, 2006
Purdy, David	December 16, 2009
Sahay, Sonya	November 29, 2008
Tracey, Elaine	December 7, 2005
Trudeau, Marcel	April 16, 2008
Young, Barbara	February 17, 1995
Members representative of workers	
Besner, Diane	January 13, 1995
Briggs, Richard	August 21, 2001
Broadbent, Dave	April 18, 2001
Carlino, Gerry	October 3, 2012
Crocker, James	August 1, 1991

Part-time	Initial appointment
Members representative of workers (continued)	
Ferrari, Mary	July 15, 2005
Gillies, David	October 30, 2002
Jackson, Faith	December 11, 1985
Lebert, Ray	June 1, 1988
Salama, Claudine	October 3, 2012
Signoroni, Antonio	October 1, 1985

Vice-Chairs and Members – Reappointments Effective 2012

	Effective
Andrew Baker	May 17, 2012
Richard Briggs	August 22, 2012
Dave Broadbent	April 18, 2012
Mary Christie	May 17, 2012
Douglas Felice	February 18, 2012
Robert Gale	October 20, 2012
Angela Grande	February 18, 2012
Kelly Hoskin	October 1, 2012
Martha Keil	February 18, 2012
Victor Marafioti	February 18, 2012
Mary E. McKenzie	June 22, 2012
David Mullan	July 5, 2012
Antonio Signoroni	January 7, 2012
Marilyn Smith	February 18, 2012
Barbara Young	February 17, 2012

New Appointments during 2012

	Effective
John Blogg, part-time Member representative of employers	November 14, 2012
Gerry Carlino, part-time Member representative of workers	October 3, 2012
Mena Falcone Johnstone, part-time Vice-Chair	October 17, 2012
Luke Petrykowski, part-time Vice-Chair	October 3, 2012
Claudine Salama, part-time Member representative of workers	October 3, 2012
Albert Suissa, part-time Vice-Chair	October 3, 2012

The Tribunal grieves the passing of David Beattie and Douglas Felice, Members representative of workers, and Tony Silipo, Vice-Chair.

Senior Staff

Susan Adams	Tribunal Executive Director
David Bestvater	Director, Case Management Systems
Debra Dileo	Director, Appeal Services
Noel Fernandes	Finance Manager
Martha Keil	Vice-Chair Registrar, Office of the Vice-Chair Registrar
Janet Oulton	Appeals Administrator
Carole Prest	Counsel to the Tribunal Chair
Dan Revington	Tribunal General Counsel
Lynn Telalidis	Associate Director, Human Resources and Labour Relations

Medical Counsellors

Dr. John Duff, Chair of Medical Counsellors	General Surgery
Dr. Emmanuel Persad	Psychiatry
Dr. David Rowed	Neurosurgery
Dr. Marvin Tile	Orthopaedic Surgery
Dr. Anthony Weinberg	Internal Medicine

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Independent Auditor's Report

To the Chair of the Workplace Safety and Insurance Appeals Tribunal

We have audited the accompanying financial statements of the Workplace Safety and Insurance Appeals Tribunal, which comprise the balance sheets as at December 31, 2012, December 31, 2011 and January 1, 2011, statements of operations, changes in fund balances and cash flows for the years ended December 31 2012 and December 31, 2011, and a summary of significant accounting policies and other explanatory information.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with Canadian public sector accounting standards, and for such internal control as management determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility

Our responsibility is to express an opinion on these financial statements based on our audits. We conducted our audit in accordance with Canadian generally accepted auditing standards. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements present fairly, in all material respects, the financial position of the Workplace Safety and Insurance Appeals Tribunal as at December 31, 2012, December 31, 2011 and January 1, 2011 and the results of its operations and its cash flows for the years ended December 31, 2012 and December 31, 2011 in accordance with Canadian public sector accounting standards.

Deloitte LLP

Chartered Professional Accountants, Chartered Accountants
Licensed Public Accountants
February 28, 2013

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
Balance Sheets

	December 31, 2012	December 31, 2011	January 1, 2011
ASSETS			
CURRENT			
Cash	**$ 913,433**	$ 1,266,533	$ 1,266,156
Receivable from Workplace Safety and Insurance Board	**1,502,669**	2,438,369	1,508,432
Prepaid expenses and advances	**320,138**	321,492	316,997
Recoverable expenses (Note 4)	**174,344**	197,161	216,476
	2,910,584	4,223,555	3,308,061
CAPITAL ASSETS (Note 5)	**147,683**	198,442	106,432
	$ 3,058,267	$ 4,421,997	$ 3,414,493
LIABILITIES			
CURRENT			
Accounts payable and accrued liabilities	**$ 1,193,088**	$ 2,503,763	$ 1,593,041
Accrued severance benefits and vacation credits	**3,141,419**	2,945,812	2,831,367
Operating advance from Workplace Safety and Insurance Board (Note 6)	**1,400,000**	1,400,000	1,400,000
	5,734,507	6,849,575	5,824,408
FUND BALANCES			
OPERATING FUND (Note 7)	**(2,823,923)**	(2,626,020)	(2,516,347)
CAPITAL FUND	**147,683**	198,442	106,432
	(2,676,240)	(2,427,578)	(2,409,915)
	$ 3,058,267	$ 4,421,997	$ 3,414,493

APPROVED ON BEHALF OF WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Ian Gracian ..... Chair

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Statements of Operations

Years ended December 31

	2012	2011
OPERATING EXPENSES		
Salaries and wages	$ **11,109,408**	$ 11,080,684
Employee benefits (Note 8)	**2,453,081**	2,417,605
Transportation and communication	**885,078**	989,931
Services and supplies	**6,847,737**	7,371,005
Amortization	**90,298**	96,479
	21,385,602	21,955,704
Services - Workplace Safety and Insurance Board (Note 9)	**549,527**	562,913
TOTAL OPERATING EXPENSES	**21,935,129**	22,518,617
BANK INTEREST INCOME	**(9,241)**	(10,235)
NET OPERATING EXPENSES	**21,925,888**	22,508,382
FUNDS RECEIVED AND RECEIVABLE FROM WSIB	**(21,677,226)**	(22,490,719)
NET UNFUNDED OPERATING EXPENSES	$ **248,662**	$ 17,663
ALLOCATED TO		
CAPITAL FUND	$ **(50,759)**	$ 92,010
OPERATING FUND	**(197,903)**	(109,673)
	$ **(248,662)**	$ (17,663)

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Statements of Changes in Fund Balances

Years ended December 31

	Capital	Operating	Total
BALANCE - JANUARY 1, 2011	$ 106,432	$ (2,516,347)	$ (2,409,915)
Additions to capital assets	188,489	-	188,489
Amortization of capital assets	(96,479)	-	(96,479)
Severance benefits and vacation credits (Note a)	-	(114,445)	(114,445)
Prepaid expenses (Note b)	-	4,772	4,772
Net funded (unfunded) expenses - 2011	92,010	(109,673)	(17,663)
BALANCE - DECEMBER 31, 2011	198,442	(2,626,020)	(2,427,578)
Additions to capital assets	39,539	-	39,539
Amortization of capital assets	(90,298)	-	(90,298)
Severance benefits and vacation credits (Note a)	-	(195,607)	(195,607)
Prepaid expenses (Note b)	-	(2,296)	(2,296)
Net (unfunded) funded expenses - 2012	(50,759)	(197,903)	(248,662)
BALANCE - DECEMBER 31, 2012	**$ 147,683**	**$ (2,823,923)**	**$ (2,676,240)**

Note a) Severance benefits and vacation credits are not funded by WSIB until they are paid.
Note b) Prepaid expenses are funded by WSIB when paid and not when expensed.

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Statements of Cash Flows

Years ended December 31

	2012	2011
NET INFLOW (OUTFLOW) OF CASH RELATED TO THE FOLLOWING ACTIVITIES		
OPERATING		
Funding revenue received from Workplace Safety and Insurance Board	**$ 22,612,926**	$ 21,560,782
Cash receipts for recoverable expenses	**811,853**	937,755
Bank interest received	**9,241**	10,235
Expenses, recoverable expenses net of amortization of $90,298 (2011 - $96,479)	**(23,747,581)**	(22,319,906)
	(313,561)	188,866
CAPITAL ACTIVITIES		
Acquisition of capital assets	**(39,539)**	(188,489)
NET (DECREASE) INCREASE IN CASH	**(353,100)**	377
CASH, BEGINNING OF YEAR	**1,266,533**	1,266,156
CASH, END OF YEAR	**$ 913,433**	$ 1,266,533

Appendix B

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2012

1. GENERAL

Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") was originally created by the Workers' Compensation Amendment Act S.O. 1984, Chapter 58 - Section 32, which came into force on October 1, 1985. The Workplace Safety and Insurance Act replaced the Workers' Compensation Act in 1997 and came into force January 1, 1998. The Workplace Safety and Insurance Board (WSIB), (formerly, Workers' Compensation Board) is required to fund the cost of the Tribunal from the Insurance Fund. These reimbursements and funding amounts are determined and approved by the Ontario Minister of Labour.

The purpose of the Tribunal is to hear, determine and dispose of in a fair, impartial and independent manner, appeals by workers and employers in connection with decisions, orders or rulings of the WSIB and any matters or issues expressly conferred upon the Tribunal by the Act.

2. ADOPTION OF CANADIAN ACCOUNTING STANDARDS FOR GOVERNMENT NOT-FOR-PROFIT ORGANZATIONS AND THE IMPACT OF TRANSITION

The Tribunal has chosen to adopt Canadian accounting standards for government not-for-profit organizations including Sections PS 4200 to PS 4270 ("PSA-NPO") of the CICA Handbook. These financial statements represent the first financial statements the Tribunal has prepared in accordance with PSA-NPO standards.

These financial statements were prepared in accordance with the provisions set out in PS 2125 of the CICA Handbook, First-Time Adoption by Government Organizations ("PS 2125"), which applies for first-time adopters of this financial reporting framework. The Tribunal has not applied any of the exemptions available in section PS 2125 as management has determined that there is no financial impact on the financial statements.

Section PS 2125 requires the presentation of corresponding information as at the date of transition, January 1, 2011, and as at the preceding fiscal year end, December 31, 2011. The corresponding financial information has been prepared and presented through the retrospective application of the PSA-NPO financial reporting framework.

The adoption of this new financial reporting framework has no impact on the previously reported balance sheet as at December 31, 2011 or on previously reported statements of operations and changes in fund balances and cash flows. Therefore a reconciliation of previously reported items to those reported using PSA-NPO has not been prepared.

The Tribunal has elected to early adopt PS 3450, Financial Instruments. These standards have not been applied retroactively as the standard specifically prohibits retroactive application. There was no impact on the Tribunal's financial statements as a result.

3. SIGNIFICANT ACCOUNTING POLICIES

The following summarizes the significant accounting policies used in preparing the accompanying financial statements:

Basis of presentation

The financial statements have been prepared in accordance with PSA-NPO accounting standards published by the Canadian Institute of Chartered Accountants using the restricted fund method of reporting revenue.

Revenue recognition

WSIB funds expenses as incurred, except for severance benefits and vacation credits, which are funded when paid, and prepaid expenses which are funded when paid and not when expensed.

Accounting estimates

The preparation of financial statements requires management to make estimates and assumptions that affect the reported amounts in the financial statements and in the accompanying notes. Due to the inherent uncertainty in making estimates, actual results could differ from these estimates. Accounts requiring estimates and assumptions are included in accrued severance benefits and vacation credits.

Capital assets

Capital assets are recorded at cost and are amortized on a straight-line basis over their estimated useful life of 4 years.

Funding for capital assets provided by the WSIB is reported in the Capital Fund. The Fund is reduced each year by an amount equal to the amortization of capital assets and increased by the additions to capital assets.

Employee benefits

(a) Pension benefits

The Tribunal provides pension benefits for all of its permanent employees (and to non-permanent employees who elect to participate) through the Public Service Pension Fund (PSPF) and the Ontario Public Service Employees' Union Pension Fund (OPSEU Pension Fund) which are both multi-employer plans established by the Province of Ontario. The plans are defined-benefit plans, which specify the amount of retirement benefit to be received by employees based on their length of service and rates of pay.

(b) Severance benefits

Severance benefits are recognized and accrued over the years in which employees earn the benefits. The severance benefit is recorded once an employee has worked for the Tribunal for a minimum term (of five years). The maximum amount payable to an employee shall not exceed one-half of the annual full-time salary. A unionized employee who voluntarily resigns is only entitled to severance benefits for service accrued up to June 30, 2010. All non-union employees who voluntarily resign are only entitled to severance benefits for service accrued up to December 31, 2011.

3. SIGNIFICANT ACCOUNTING POLICIES (continued)

(c) Vacation credits

Vacation entitlements are accrued in the year when vacation credits are earned. Employees may accumulate vacation credits to a maximum of one year's vacation entitlement at December 31 of each year. Senior Management Group is also eligible to time bank up to ten vacation days per year. Employees are paid for any earned and unused vacation credits at the date they cease to be an employee.

(d) Non-pension future benefits

The Tribunal also provides for dental, basic life insurance, supplementary health and hospital benefits to retired employees through a self-insured, unfunded defined benefit plan established by the Province of Ontario.

The Tribunal does not accrue for non-pension future benefits liability since the information is not readily available from the Province of Ontario.

4. RECOVERABLE EXPENSES

Recoverable expenses consist of amounts recoverable for shared services, secondments and other miscellaneous receivables.

	December 31, 2012	December 31, 2011	January 1, 2011
Shared services			
Ontario Labour Relations Board	**$ 78,098**	$ 63,247	$ 81,091
Pay Equity Hearings Tribunal	**4,285**	5,166	4,874
Human Rights Tribunal of Ontario	**6,570**	4,823	6,196
Secondments			
Ministry of Finance	**3,509**	6,058	-
Ministry of Attorney General	**2,539**	-	-
Ministry of Government Services	-	25,375	5,759
Ministry of Community and Social Services	-	-	11,218
Others			
Canada Revenue Agency HST rebate receivable	**54,133**	60,652	66,889
Employee amounts receivable	**25,210**	31,840	38,470
Ontario Public Service Employees Union	-	-	1,979
Total	**$ 174,344**	$ 197,161	$ 216,476

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Notes to the Financial Statements

December 31, 2012

5. CAPITAL ASSETS

	December 31, 2012		
	Cost	**Accumulated Amortization**	**Net Book Value**
Leasehold improvements	**$ 3,040,078**	**$ 3,016,676**	**$ 23,402**
Furniture and equipment	**749,425**	**748,174**	**1,251**
Computer equipment and software	**496,918**	**373,888**	**123,030**
	$ 4,286,421	**$ 4,138,738**	**$ 147,683**

	December 31, 2011		
	Cost	Accumulated Amortization	Net Book Value
Leasehold improvements	$ 3,011,600	$ 3,008,534	$ 3,066
Furniture and equipment	747,758	738,254	9,504
Computer equipment and software	490,740	304,868	185,872
	$ 4,250,098	$ 4,051,656	$ 198,442

	January 1, 2011		
	Cost	Accumulated Amortization	Net Book Value
Leasehold improvements	$ 3,007,511	$ 3,000,002	$ 7,509
Furniture and equipment	802,946	779,518	23,428
Computer equipment and software	342,849	267,354	75,495
	$ 4,153,306	$ 4,046,874	$ 106,432

6. OPERATING ADVANCE FROM WSIB

The operating advance is interest-free with no specific terms of repayment.

7. OPERATING FUND

The Operating Fund deficit of $2,823,923 as of December 31, 2012 (December 31, 2011 - $2,626,020, January 1, 2011 - $2,516,347) represents future obligations to employees for severance and vacation credits, less prepaid expenses. Funding for these future obligations will be provided by WSIB in the year the actual payment is made.

Appendix B

8. EMPLOYEE BENEFITS OBLIGATIONS

a) Pension plan costs

Contributions by the Tribunal on account of pension costs amounted to $920,589 (2011 - $895,206) and are included in employee benefits in the Statement of Operations.

b) Severance benefits

Severance benefits are recognized and accrued over the years in which employees earn the benefits. The net severance benefits accrued in 2012 amounted to an increase of $159,280 (2011 - $88,642) over the prior year amount and is included in employee benefits in the Statement of Operations.

c) Vacation credit entitlement

Vacation entitlements are accrued in the year when vacation credits are earned. The net vacation credits accrued in 2012 amounted to an increase in the accrual of $36,327 (2011 - $25,803) over the prior year amount and is included in employee benefits in the Statement of Operations.

d) Non-pension future benefits

The Tribunal does not accrue for non-pension future benefits, since the information is not readily available from the Province of Ontario.

9. SERVICES – WSIB

The expense represents administrative costs for processing claim files of the WSIB, which are under appeal at the Tribunal, pursuant to section 125 (4) of The Workplace Safety and Insurance Act, 1997.

10. LEASE COMMITMENTS

The Tribunal has several operating lease contracts for computer and office equipment and software license fees, with terms from 1-5 years. The minimum payments under these leases are as follows:

2013	$ 177,047
2014	131,147
2015	87,364
2016	72,840
Minimum operating lease payments	$ 468,398

10. LEASE COMMITMENTS (continued)

The Tribunal is committed to lease payments for premises, including building operating costs. The lease expires on October 31, 2015. The minimum lease payments are as follows:

2013	$1,531,406
2014	1,531,406
2015	1,276,172
Minimum operating lease payments	$4,338,984

The Tribunal has exercised its option to renew the lease for the premises for a five year term which expires on October 31, 2015.

11. CONTINGENT LIABILITIES

A claim from the Canada Revenue Agency (CRA) has been made against the Tribunal for withholding taxes on individuals (Part-time Order in Council appointees) who the Tribunal consider as "fee- for- service" contractors. The Tribunal believes that its classification is correct and filed a notice of appeal. CRA informed the Tribunal in November 2012 that the claim (assessment) has been partially cancelled; however an issue remains outstanding which is being negotiated between the Federal and Provincial governments. The outcome of this negotiation is not determinable as at December 31, 2012, and accordingly, no provision has been made in these financial statements for any liability that may result. Any loss resulting from these claims will be recognized in the year when it becomes known.